Supreme Court of the United States

OCTOBER TERM, 1942

No. 694

BURRUS MILL & ELEVATOR COMPANY OF OKLAHOMA,
Petitioner,

v.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, FRANK O. LOWDEN, JAMES E. GORMAN, AND JOSEPH B. FLEMING, AS TRUSTEES OF THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Attorneys for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Petitioner, Burrus Mill & Elevator Company of Oklahoma, prays a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Tenth Circuit, entered herein on November 2, 1942 (R. 266-271).

STATEMENT.

This was an action to recover freight overcharges for the transportation of certain carloads of wheat from St. Louis, Missouri, through Enid and Kingfisher, Oklahoma, where it was stored and milled into flour, to Memphis, Tennessee. The action was commenced in the District Court of Kingfisher County, Oklahoma, and was removed upon petition

of respondents to the District Court of the United States for the Western District of Oklahoma.

The petitioner, an Oklahoma corporation, is engaged in the business of buying wheat and milling it into flour at its mill located at Kingfisher. In July and August, 1935, petitioner purchased 106 carloads of wheat in St. Louis, Missouri, and shipped certain of them over respondents' line to its mill at Kingfisher, where the wheat was milled into flour, and others to Enid where they were stored and later moved to Kingfisher for milling. During the same period petitioner shipped over respondents' line from Kingfisher to Memphis, Tennessee, 211 carloads of flour, which is the same amount of tonnage as 106 carloads of wheat. (Stipulation of Facts, R. 47-48.)

During the period in question, July-August, 1935, the respondents' legal proportional rate, published in their tariff on wheat and flour in carloads, from St. Louis to Memphis was 11 cents per hundred pounds. (R. 62.) Under respondents' transit tariffs, transit privileges of two stops in transit for storing or milling, free of charge, were permitted. (Finding of Facts, R. 253.) On August 5, 1935, the petitioner's traffic manager inquired of respondents by telephone and telegram if petitioner's understanding that the transit privilege was available at Kingfisher on the 11 cent rate on shipments from St. Louis to Memphis through Kingfisher, and was advised by respondents that it was. On August 7, 1935, respondents advised that in correction of their wire of August 5, that a combination of rates equaling 34 cents must be charged instead of the 11 cent rate set forth in the tariff. (R. 59.) The 34 cent rate was exacted by respondents and the action was brought to recover the difference between the charge as made and as it would have been if the 11 cent rate had been applied.

One of the Transit Tariffs of the respondents contained among other things Item 20 which read as follows:

> "Shipments passing through or stopped at points from which proportional rates are published shall be charged

the combination of rates to and from each proportional rate point on the route of movement. (See Exception, Item No. 12).

EXCEPTION.—Where the lowest combination of rates via a route to and from one proportional rate point has been published for application over another route which passes through one or more proportional rate points, transit may be given at intermediate points on the latter route on basis of the lowest rate applicable. The transit point shall be intermediate on the route first described." (R. 117.)

The District Court found that under the terms of the tariff transit privileges were not available at Enid and Kingfisher on the shipments involved in this case on the 11 cent rate; that the exception to Item 20 did not apply and that the shipments in question did not come within the purview of the exception; that the rate of 34 cents was the lowest applicable rate as a component factor of the through combination rate for each of the shipments from the origin beyond St. Louis to the destination beyond Memphis with transit at either or both Enid or Kingfisher, Oklahoma. (Finding of Facts, R. 253.) The Court concluded that the tariffs were clear and unambiguous and could not be construed as authorizing any rate on the shipments involved lower than that constructed by using 34 cents per one hundred pounds, and that the rate of 11 cents was not applicable and the plaintiff should recover nothing. (Conclusions of Law, R. 254-255.)

The judgment of the District Court was entered on May 17, 1941, and the petitioner on May 27, 1941 filed a motion to amend the finding of facts and the conclusions of law, and a motion for a new trial. The motions were argued on July 21, 1941, and on September 29, 1941, the District Court entered its order denying the said motions. (R. 255-260.)

An appeal was taken to the Circuit Court of Appeals for the Tenth Circuit, briefs were filed and the case was argued.

On November 2, 1942, the Circuit Court of Appeals affirmed the judgment of the District Court, holding that the exception to Item 20 had no application to the shipments in question and the tariff was not ambiguous.

STATUTES INVOLVED.

This case does not involve the construction of any statutes.

QUESTIONS PRESENTED.

I

Should not an item in a freight tariff which purports to determine the rates to be charged, be indexed and so placed in the tariff that it will be read with all other provisions relating to the rates to be applied if it is to be given the intended effect of determining the rates?

II

In view of the express language of respondents' tariffs, did not the 11 cent rate apply because it was the legal, published rate?

III

Are not the tariff provisions involved in this controversy ambiguous and, therefore, to be construed in favor of the shipper?

PETITIONER'S POSITION.

Petitioner contends that the only charge which could be legally exacted for the shipments in question was that which was constructed by using the rate of 11 cents per one hundred pounds from St. Louis to Memphis, as this was the only proportional rate from and to those points which was set forth in the tariff. The provisions of Item 20 in no way served to change the applicability of the 11 cent rate because Item 20 was so placed or indexed in the tariff that it would not be read with other provisions relating to the

rates to be applied. It was only by merest chance that anyone reading the tariff would learn that Item 20 had any bearing upon rates to be charged, and it, therefore, could not be given the effect of determining the rate. Furthermore, the exception to Item 20 can not be construed as preventing its application to the shipments here involved; therefore, Item 20 did not interfere with the application of the 11 cent rate as the factor for the St. Louis to Memphis portion of the movement.

The tariffs of the respondents viewed in the most favorable light to the respondents are ambiguous and, therefore, require the application of the 11 cent rate under the well established rule that ambiguities in tariffs must be resolved in favor of shippers.

REASONS FOR GRANTING THE WRIT.

In this case the District Court and the Circuit Court of Appeals have disregarded the settled doctrine relating to the construction of freight tariffs which has been developed by the Interstate Commerce Commission, the Circuit Courts of Appeals of other circuits and approved by this Court. While paying lip service to the rule that ambiguities in tariffs are to be resolved in favor of the shipper (*Northwest Steel Company* v. *Director General*, 68 I. C. C. 195; *Sutherland Flour Mills Co.* v. *Director General*, 81 I. C. C. 366; *Southern Pacific Co.* v. *Lothrop*, 15 F. (2d) 486; *Updike Grain Co.* v. *Chicago & North Western Railway Co.*, 35 F. (2d) 486; *Atlantic Coast Line Railroad Co.* v. *Atlantic Bridge Co.*, 57 F. (2d) 654; *United States* v. *Gulf Refining Co.*, 268 U. S. 542; *Southern Pacific Co.* v. *United States*, 237 U. S. 202) the Circuit Court of Appeals has decided this case contrary to the holdings of the above cited cases by the holding that there is no "substantial" ambiguity. This results in the decision of a substantial Federal question concerning the proper construction of tariffs used in interstate commerce in a way contrary to principles set forth

in decisions of this Court, the Interstate Commerce Commission and other Federal Courts.

Wherefore, it is respectfully requested that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Tenth Circuit be granted.

H. D. Driscoll,
H. Russell Bishop,
Attorneys for Petitioner.

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BRIEF IN SUPPORT OF PETITION.

OPINIONS BELOW.

The Findings of Fact and Conclusions of Law of the District Court (there was no opinion by the District court) are in the record at Pages 251 to 255. The opinion of the Circuit Court of Appeals has not as yet been reported; it is in the record at Pages 266 to 271.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code of the United States as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938 (28 U. S. C. Sec. 347(a)).

QUESTIONS PRESENTED.

The questions here presented are stated in the Petition (*ante* p. 4).

STATUTES.

There are no statutes involved.

SPECIFICATION OF ERRORS TO BE URGED.

These are indicated under the headings, "Questions Presented" and "Petitioner's Position" in the Petition (*ante* pp. 4-5) and in the Subject Index (*ante* p. i).

ARGUMENT.

Point I.

Because of Its Location in the Tariff, Item 20 Did Not Limit or Abrogate the Applicability of the 11 Cent Proportional Rate from St. Louis to Memphis.

Both the District Court and the Circuit Court of Appeals held that Item 20 limited or abrogated the 11 cent proportional rate from St. Louis to Memphis, which undoubtedly would otherwise have been the only applicable rate on the shipments in question. (Findings of Fact Nos. 13 and 14, R. 253; Opinion of the Circuit Court of Appeals, R. 268). These holdings entirely overlooked the fact, which is clearly upon the record, that Item 20 was so placed in the tariff that it could not operate to affect the 11 cent rate.

The tariff in question (Chicago, Rock Island and Pacific Railway Freight Tariff No. 34562) is Exhibit No. 17 (R. 115). Pages 14 to 18 of that tariff show at the top of each page "Application of Tariff" and it is under this heading that Item 20 appears. (R. 117.) Pages 22 and 23 are headed "Rates to Apply and Proportions to and from Transit Stations." (R. 119, 121.)

If Item 20 is to be construed as determining the rates to have been applied on the shipments involved herein, then

there was only one place in the tariff where it could be placed to have that effect, and that is with those items which appear on pages 22 and 23, for they appear to be a complete unit in themselves.

On page 23 of the tariff (R. 121) there appears Item 735 which reads as follows:

> "That portion of Item No. 600 providing that rate from transit point to destination or from point of origin to transit station will govern where higher than the rate in effect from initial point of shipment to destination will be waived on the following shipments:
>
> ORIGIN TERRITORY
>
> 1—Originating at points in Kansas and destined points referred to in paragraph 4.
>
> 2—Moving on proportional rates from Missouri River points (see Index Nos. 9975 to 9983, inclusive) and destined points referred to in paragraph 4.
>
> 3—Moving through Missouri River points (see Index Nos. 9975 to 9983, inclusive), and destined points referred to in paragraph 4."
>
> DESTINATION TERRITORY
>
> 4—To destinations in or moving through Arkansas, Louisiana and Texas, and to or through Memphis, Tenn."

Item 20, if it was to have the effect imputed to it by both of the lower courts, should either have been referred to in Item 735 or made a part thereof. This follows because Item 735 provides that shipments moving through Missouri River points and destined to points east of Memphis would be charged the rate from St. Louis to Memphis, *irrespective of the fact that the rate to or from the transit point may have exceeded the rate to Memphis.*

Pages 22 and 23 purport to contain the complete provisions of the tariff for the rates to be applied. Anyone attempting to determine what rate a shipment would carry would be justified in assuming that complete information

would there be given. Yet there is no reference to Item 20, and it would be only by merest chance that anyone would see Item 20, located as it is in an entirely different part of the tariff, where it does not belong and under a different heading. The respondents, although it was their own tariff, did not find Item 20 for two days after their first quotation. (Telegram of August 7, 1935. R. 59.)

The location of a rule in a tariff is most important because "the rule fixes the rate". As the Interstate Commerce Commission stated in *Furnishing Ice and Salt for Protection of Perishable Freight,* 88 I. C. C. 361 at page 363,

> "The location of a rule in a tariff must be considered in determining the correct application of the rule."

It must be so located as to be read with other pertinent parts of the tariff or it might just as well not be printed. As was said in *Chamber of Commerce* v. *I. & G. N. Ry. Co.,* 32 I. C. C. p. 47 at pp. 255:

> "Rates should be published in such a way as to apprise shippers of their existence."

The same principle applies to rules.

The reason for the principle is obvious; if tariffs provisions can be isolated and hidden under headings where no one would expect to find them, then tariffs become traps for the unwary and shippers never know what rates they must pay.

Point II.

Under the Express Language of the Respondents' Tariffs the 11 Cent Rate Was Applicable With Transit Privileges at Enid and Kingfisher.

The size of the record in this case would give the idea that the case contained many questions of law and fact. This is because so many extraneous matters, as for instance, the Interstate Commerce Commission's investigation into the grain rate structure, Docket No. 17000, have been in-

jected into the case. There is really but one question and that is what rate applied on these shipments and the answer to that is to be found only by finding what was the applicable rate published in the tariffs of the respondents. This is the only rate that could legally be charged regardless of whether it was high or low, reasonable or unreasonable. So long as it was the published rate, it was the rate which the respondents were bound to charge and the petitioner was bound to pay. Interstate Commerce Act, Sec. 6(1); *Kansas City Southern Ry. Co.* v. *C. H. Albers Commission Company,* 223 U. S. 575.

Thus the only tariff item which was confusing and open to more than one construction was Item 20 of the Rock Island tariff No. 34562 (Ex. 17, R. 117.) That it was confusing and was open to more than one construction is abundantly proved by matter in the record, e. g., Exhibits 26, 27 and 28. (R. 180 to 227.)

There is no dispute as to the fact that the claimed 11 cent rate was legally applicable if the shipments had simply moved from St. Louis to Memphis over the line of the respondents through Kansas City, Enid, Kingfisher, Little Rock, etc., or if the milling had been done beyond St. Louis or beyond Memphis. (Stipulation of Facts, R. 62.) Nor would there have been any question of the applicability of the 11 cent rate with transit privileges at Enid and Kingfisher if the respondents had had a "by pass" around Kansas City and the cars would never have entered the railroad yards at that point. Since, however, the shipments were given transit privileges at Enid and Kingfisher, the controlling question is: Did Item 20 of the respondents' tariff referred to above plainly require respondents to charge the combination rate of 34 cents, the sum of the 14 cent rate from St. Louis to Kansas City and the 20 cent rate from Kansas City to Memphis?

There can be little doubt but that Item 20 was intended to provide that when shipments of grain or grain products moved from one terminal market to another through a

third market, that shipments would be made from the intermediate third market on the proportional rate instead of on a balance of a through rate that applied through that intermediate market. To illustrate, on page 486 of the Commission's decision in Docket No. 17000, Part VII, *Grain and Grain Products Within the Western District and For Export*, 205 I. C. C. 301. (Ex. 10, R. 79), will be found rates; from Omaha to St. Louis, 13 cents; from Omaha to Kansas City, 6 cents; from Kansas City to St. Louis, 11 cents. It was clearly intended that if a Kansas City mill should bring in grain from Omaha and ship its products to St. Louis, it would have to pay the combination rate of 6 cents into Kansas City and 11 cents out to St. Louis, or a total of 17 cents, instead of taking transit at Kansas City on the 13 cent through rate which applied from Omaha to St. Louis through Kansas City (6 cents in and 7 cents out). To meet such a rate break system, it was necessary, of course, to have a general rule to apply at all of the markets from which proportional rates were published as listed in the table on page 486 of the decision referred to.

An examination of the tariff involved in this controversy which contains this rule shows first on its title page (R. 115) that the transit privileges provided therein were applicable at stations on the respondents' line in Arkansas, Colorado, Kansas, Louisiana, Nebraska, Oklahoma, also at Memphis and Missouri River points and at stations on the Rock Island in Texas. It necessarily follows, then that Item 20 was framed to fit the general situation and that it was applicable at Missouri River points, such as Kansas City, as well as interior mill points, such as Enid and Kingfisher.

In reading Item 20 in an effort to determine its effect upon the applicability of the 11 cent proportional rate from St. Louis to Memphis, it is observed that shipments passing through points from which proportional rates were published shall have been charged a combination of rates to and from each proportional rate point on the route of move-

ment. This is a provision in a transit tariff and, of course, related only to shipments accorded transit.

Tariffs are construed like contracts and statutes, that is to arrive at the sensible meaning of the words employed. *Boone* v. *U. S.*, 109 F. (2d) 560; *Great Northern Ry. Co.* v. *Delmar*, 43 F. (2d) 948; *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285. Language used therein is to be given a reasonable and not an absurd construction, but where ambiguities occur, they will be construed against the party writing them. *Southern Pac. Co.* v. *Lothrop*, 15 F. (2d) 486; *Updike Grain Company* v. *Chicago & N. W. Ry. Co.*, 35 F. (2d) 486; *Atlantic Coast Line Ry. Co.* v. *Atlantic Bridge Co.*, 57 F. (2d) 654. The construction asserted by respondents and approved by the lower courts results in a preposterous and absurd conclusion, if carried to its logical end.

The effect of this language was to charge twenty-three cents per hundred pounds for the privilege of stopping these cars of wheat in transit to mill them into flour, a privilege ordinarily given free—and given free in the very tariffs involved here. This is admitted by the respondents in this language (R. 196):

> "The net result of the assessment of the foregoing charges was equivalent to assessing a charge for stopping the shipments in transit at Kingfisher of 23¢ per 100 pounds on the shipments going to Memphis for beyond."

In other words, the effect of this 23 cent additional charge is to make the rate three times what it would have been (11 cents) if the grain had not been stopped in transit or if the transit privilege had been taken beyond St. Louis or beyond Memphis.

Next, consider the words in Item 20, "from which proportional rates are published." Do these rates indicate that if proportional rates were published from Kansas City to San Francisco that only the combination on Kansas City

must have here been applied? This item should be read as if it stated that the proportional rate (from Kansas City) would have to have been in effect to the final destination of the grain or its product. There was in effect a proportional rate from Kansas City to Memphis, which was at no time the destination of the wheat or the product, but there was no proportional rate from Kansas City to Knoxville (for example, the destination of part of the grain shipments in controversy) unless it be that the combination of the proportional rate from Kansas City to Memphis, plus a local rate from Memphis to Knoxville could be considered as a proportional rate from Kansas City to Knoxville. If that construction is adopted, then the absurd conclusion follows that a point having only one proportional rate has a proportional rate to every town in the United States or even beyond.

Proportional rates which are often used for equalizing purposes or for tariff simplification may be proportional on the origin end, meaning that the grain must have had a prior rail haul to be entitled to such proportional rate, or, may be proportional on the destination end, indicating that shipments must receive a subsequent rail haul to be entitled to the proportional rate.

In the first sentence of Item 20 (R. 117) it was said that if the shipments passed through more than one point from which proportional rates were published, the charge would have been the combination of rates to and from each proportional rate point on the route of movement.

As shown in Ex. 21 (R. 147-167) proportional rates were published from Enid, Kingfisher, El Reno, Oklahoma City, and, in fact each and every station on the Rock Island line from the Kansas-Oklahoma line north of Renfrow to the last station in Oklahoma, near the Oklahoma-Arkansas border, east of Howe.[1] So that one construction of Item 20

[1] Enid is in origin Group 632 (R. 151), Memphis is in group 74-B (R. 157). The local rate from group 632 to group 74-B is 34 cents (R. 163). The proportional rate from group 632 to group 74-B is 30 cents (R. 167).

must be that (where transit was taken) combinations would be made of the rate from St. Louis to Kansas City plus the rates from Kansas City to Renfrow, Renfrow to Medford, Medford to Jefferson, Jefferson to Pond Creek, Pond Creek to Kremlin, Kremlin to North Enid, North Enid to Enid, and so on all around the circle until it got to the Arkansas-Oklahoma line. There are 44 of these stations (proportional rate points) which would mean about 45 combinations to be added together to determine the rate to be charged if transit were taken at Enid, Kingfisher, or any other intermediate point.

If Item 20 means that the combination must have been applied on shipments "passing through a point from which proportional rates were published," regardless of whether the rates are proportional on the origin end or proportional on the destination end, then it is clearly evident that respondents have not applied the legally published rate on any of the shipments involved.

The respondents concede in Paragraph 10 of the stipulation (R. 50) that they have never construed Item 20 to prohibit the application of through rates with transit on this traffic. The typical car set out in the stipulation serves as an example. When that wheat moved from St. Louis to Enid, (for Storage) respondents collected the rate into Enid. When that wheat was later moved from Enid to Kingfisher, the stipulation recites that petitioner paid no freight charges for its transportation from Enid to Kingfisher (R. 53). The stipulation there recites:

> "Plaintiff has not paid any freight charges to defendants for the transportation of this shipment from Enid to Kingfisher. The proportional rate from St. Louis to Enid was the proportional rate from St. Louis to Kingfisher."

Similarly, Exhibit 27, Sheet 2 of Exhibit 1 attached to the Special Docket application shows "Rate and Amount" from Enid to Kingfisher as "free" (R. 201).

If Item 20 meant that on a shipment from St. Louis to Memphis, milled at Kingfisher or stored at Enid, the Kansas City combination of 34 cents must be collected, then the same item certainly meant that on a shipment of wheat from St. Louis to Kingfisher, stored at Enid, the combination on Kansas City would also have to be applied, namely, 14 cents from St. Louis to Kansas City and 20 cents from Kansas City to Kingfisher.

Certainly, Item 20 cannot be read one way when Enid was the transit point and Kingfisher the destination and another way when Kingfisher was the transit point and Memphis the destination. In the exchange of telegrams (Stipulation of Facts, Par. 15, R. 59) it is stated that on August 5, 1935, the respondents construed the tariffs to permit transit at Kingfisher on the 11 cent rate. On August 7 respondents wired petitioner's representative that they "now find Item 20 * * * requires protection Kansas City combination." Many months later as shown in the Stipulation of Facts (Par. 10, R. 53) on January 8, 1936, when the three cars of wheat which had been stored at Enid moved on to Kingfisher, respondents did not regard Item 20 as prohibiting a through rate with the transit privilege at Enid when the destination was Kingfisher. The respondents placed a different construction on Item 20 in the case of wheat accorded transit at Enid from that in the case of wheat accorded transit at Kingfisher.

The exception of Item 20 did not have the effect of making any rate other than the 11 cent rate applicable to the shipments in question. This exception (R. 117) was evidently intended to prevent multiple combinations. Manifestly it must have been considered in connection with the through charge from origin of the wheat to the final destination of the flour because it referred to combinations of rates and not to any particular factor.

It was intended to apply to a situation such as this (Stipulation of Facts No. 10 and 10½, R. 50-57) where wheat originated in Ridge Farm, Illinois and moved into St.

Louis; from there moved on the proportional rate of the Rock Island to Memphis (around through Kansas City and Kingfisher) and the product finally moved from Memphis to Knoxville. The exception must have meant that where the lowest combination of rates via a route to and from one proportional rate point (St. Louis) had been published for application over another route which passed through one or more proportional rate points (St. Louis, Kansas City, Enid, Kingfisher, Oklahoma City, etc.) transit may have been given at intermediate points on the latter route on the basis of the lowest rate applicable, which of course means the lowest rate applicable from Ridge Farm Illinois to Knoxville through St. Louis, as claimed herein.

If the exception stopped there, there would be no question that the 11 cent rate claimed herein would have been applicable with transit, on all the shipments involved herein which were accorded transit at Enid and Kingfisher. However, there is also the last sentence, which reads, "The transit point shall be intermediate on the route first described." (Actually no route was "first described.") If the transit had been taken at a point between Ridge Farm, Illinois, and St. Louis or at a point east of Memphis (such as Alton, Illinois, or Chattanooga, Tennessee), the through rate which petitioner contends for herein would have been clearly applicable. If the transit had been taken at Alton, Illinois, or Chattanooga, Tennessee, it would have been at a point "intermediate on the route first described."

This raises the question as to whether Enid or Kingfisher were on another route from Ridge Farm, Illinois, to Knoxville, Tennessee. The record shows that other routes were open at that time from St. Louis to Memphis, carrying the traffic through Kansas City, Enid and Kingfisher. (Exhibit 2, R. 81-107.)

The 11 cent rate was not only published over the line of the Rock Island from St. Louis to Memphis but also was published over the line of the Rock Island from St. Louis to Brinkley, Arkansas, and thence over the St. Louis South-

western beyond, both of which routes were through Enid and Kingfisher. The exception to Item 20 provided for transit at those intermediate points which were on more than one route, and since Enid and Kingfisher were on two routes from St. Louis to Memphis, they were entitled to transit on the lowest combination of rates from Ridge Farm, Illinois to Knoxville, Tennessee.

Tariff 225 (Ex. 12, R. 81 to 107), in addition to naming a proportional rate of 11 cents per hundred from St. Louis to Memphis, also carried a proportional rate of 11 cents from St. Louis to Helena, Arkansas,[2] when routed over the line of the respondents from St. Louis through Enid and Kingfisher to Wheatley, Arkansas and thence over the line of the Missouri & Arkansas Railroad to Helena. This rate was proportional on the origin end and the destination end as well, as it was restricted to shipments moving to points east of the Mississippi River, and obviously was published to bring about an equalization of rates from the origins beyond St. Louis to the final destinations in the southeast, thorugh the two River Crossings of Memphis and Helena.

It is therefore seen that, in addition to the route previously mentioned in connection with the St. Louis-Southwestern, there was also a route through the Helena gateway. (See Item 90, R. 279.) There were thus a total of three routes from origins to final destinations through the transit points of Enid and Kingfisher, and therefore within the exception to Item 20 previously referred to, and especially the last sentence in Item 20 which provided that the transit points must have been intermediate on more than one route. Item 20 soon became so troublesome that it was shortly cancelled out. (R. 233)

From the foregoing, we submit, it logically follows that the 11 cent rate was the only rate which could apply on the shipments involved.

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[2] Group 70-B (R. 99).

Point III.

The Tariffs of the Respondents Governing the Shipments in Controversy, Viewed in the Most Favorable Light to the Respondents, Are Ambiguous, and Therefore Require the Application of the 11 Cent Rate Under the Rule that Ambiguities in Tariffs Must be Resolved in Favor of Shippers.

Tariffs are required to be clearly written so that those dealing with them may be apprised of the applicable rates and this is especially true where, as here, the attempt is made to restrict the application of certain rates. In *Henry Lichtig & Company* v. *Missouri Pacific,* 190 I. C. C. 229, the Interstate Commerce Commission said:

> "We have consistently pointed out that if it is the purpose to restrict the application of rates over any particular route and transit service in connection therewith to a certain point or points, it should be done by clear and unequivocal language."

Highly similar language is used in *Rea-Patterson Milling Company* v. *Missouri Pacific,* 196 I. C. C. 323, 324. Both of these cases involved transit rates on grain and grain products as does the instant case. Certainly the tariffs before the Court do not meet the test announced by the Commission as they do not in "clear and unequivocal language" provide for any restriction in the application of rates over the particular routes in question.

As appears in paragraph 11 of the amended complaint (R. 39) and the stipulation (R. 47 *et seq.*), petitioner shipped the first car from Kingfisher to a point beyond Memphis on August 3, 1935 (R. 13, Line 1), and was compelled to pay thereon the sum of 34 cents per pound for the haul from St. Louis to Memphis. Two days later, August 5, 1935, a wire was sent respondents, reading as follows (R. 59):

> "Are we correct understanding transit available Kingfisher Oklahoma on rate eleven cents Saint Louis to

> Memphis for beyond page fifty three Johanson tariff two two five and item seven thirty five your transit tariff three four five sixty two."

In reply, the respondents wired as follows (R. 59):

> "Retel and conversation date subject to requirements item one ten Johansons tariff two two five your understanding correct."

Then four more cars of flour were shipped on August 5th (R. 13, Lines 2 to 6). Petitioner also at the same time bought 25,000 more bushels of wheat (R. 68), and on August 6th, bought an additional 100,000 bushels (R. 66, 67, 69. Then on August 7th, respondents wired that they regretted that they had misconstrued the tariff, using this language (R. 69):

> "Correction our wire fifth. Regret now find item twenty tariff three four five six two requires protection Kansas City combination thirty four cents on grain St. Louis to Memphis via Rock Island."

Of course, even though petitioner acted upon such telephone conversation and wires, to its extreme detriment, the point of estoppel is not being here made. We point this situation out as strong argument in support of our contention that the tariff was certainly ambiguous from an examination of the conduct of respondents themselves, who could not construe the tariff twice alike in several days' intervening time. Yet it was their own tariff they were attempting to construe.

Purchasers of wheat and sellers of flour can not be expected to take weeks and months to determine the applicable rate; they must rely upon their traffic manager to give them the necessary information while the wholesale baker is holding the long distance telephone. After the purchase and sale have been consummated and confirmed, the shipper has no way of avoiding his contract. For those reasons among others, tariffs should be clear and unambiguous if a shipper is to remain solvent and stay in business. This is

a case where a relatively small flour mill company in Oklahoma might lose $25,000 in one transaction, notwithstanding the fact that it had experienced traffic men in its employ and had used every precaution by not only getting the confirmation from the railroad by long distance telephone, but having it verified by telegraph (R. 59).

The Courts and the Commission have long recognized the familiar rule that in case of ambiguity the tariff must be construed against the framer. *Northwest Steel Company et. al.* v. *Director General, as Agent, Oregon Washington Railroad & Navigation Company et al.*, 68 I. C. C. 195, 198. The rule is well stated in *Atlantic Coast Line R. R. Co.* v. *Atlantic Bridge Co., Inc.*, 57 F. (2d) 654, wherein the court said:

> "Tariffs, like statutes, have the force of law; like statutes, they must be expressed in clear and plain terms, so that those dealing with and governed by them may understand them and act advisedly. *Swift* v. *U. S.* (C. C. A.) 255 F. 291. They may not be contrived in catchpenny terms to catch the ignorant and unwary. If they are ambiguous, or permit of two meanings, the shipper may construe them in the most favorable way to himself which the terms permit. *Southern Pac.* v. *Lothrop* (C. C. A.) 15 F. (2d) 486; *American Ry. Express Co.* v. *Price Bros.* (C. C. A.) 54 F. (2d) 67; *U. S.* v. *Gulf Refining Co.*, 268 U. S. 543. * * * It is equally clear that a carrier may not, under a tariff couched in general terms, which if interpreted in one way, will produce a higher, in another a lower, rate, insist upon the interpretation which gives it the higher rate. In short, in a situation of that kind, the shipper who has to pay the freight may call the tune."

The rule concerning the construction of ambiguous tariffs favorably to the shipper is so well established it would be supererogation to give more citations from this Court, the lower Federal Courts and the Interstate Commerce Commission.

We submit that the facts appearing of record and fully set forth in the statement in the petition (*ante* pp. 1-4) and the discussion under Point II (*ante* pp. 10-18) fully demonstrate that there was ambiguity in the tariff and that the ambiguity was so "substantial" that neither the shipper nor the carrier could be certain of the rate which applied on the shipments. To refuse to acknowledge the ambiguity and to construe the tariff favorably to the shipper as the Circuit Court of Appeals did here is to disregard a principle which has been firmly established in our federal jurisprudence for over half a century.

CONCLUSION.

The decisions of the District Court and the Circuit Court of Appeals are clearly erroneous and should be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 694

BURRUS MILL & ELEVATOR COMPANY OF OKLAHOMA,

Petitioner,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, FRANK O. LOWDEN AND JOSEPH B. FLEMING AS TRUSTEES OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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INDEX.

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THE OPINIONS OF THE COURTS BELOW.

The findings of fact and conclusions of law by the District Court are set out of record at pages 251 to 255, inclusive. The District Court filed no opinion. The opinion of the Circuit Court of Appeals for the Tenth Circuit appears of record at pages 266 to 271, inclusive. To date this opinion has not been reported.

JURISDICTION.

Petitioner states that the jurisdiction of the Court is invoked under Section 240 of the Judicial Code of the United States as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938 (28 U. S. C. Sec. 347(a)). It is the position of respondents (hereinafter referred to as the Rock Island) that the judgment of the District Court (R. 255)* in favor of respondents and against petitioner and the judgment of the Circuit Court of Appeals (R. 271) affirming the judgment of the District Court are in accordance with the law and the facts; that the petition for certiorari does not present either in form or substance any question for review by this Court; and that the petition should be denied.

* Such references are to the pages of the printed record.

STATEMENT OF THE CASE.

By a more complete statement of the setting or background, out of which the questions presented arise, than the petition for review contains, it was possible for petitioner to better acquaint this Court with the issues before the Courts below.

THE REPORT AND ORDER OF THE INTERSTATE COMMERCE COMMISSION, EFFECTIVE JULY 1, 1935, WITH THE REQUIREMENTS OF WHICH THE TARIFF RATES, RULES, AND REGULATIONS APPLICABLE TO THE TRANSPORTATION OF THE SHIPMENTS IN QUESTION WERE PUBLISHED TO COMPLY.

The report and order of the Interstate Commerce Commission in *Grain and Grain Products Within The Western District And For Export* (the Grain Case), 205 I. C. C. 301* (Exhibit 10—R. 79) followed a comprehensive investigation into the rates and practices affecting the transportation of grain and grain products in the Western District. The extent and manner of the revision thereby prescribed are indicated by the opinion of this Court in *Board of Trade of Kansas City* v. *United States*, 314 U. S. 534.

The Commission's order in the Grain Case, 205 I. C. C. 301, requiring compliance therewith on or before July 1, 1935, as entered and prior to its modification by the Commission on August 1, 1936, was in effect throughout the period involved in the present case. The tariffs containing the rates, rules, and regulations in evidence and applicable to the transportation of petitioner's shipments,

* Earlier decisions in the same proceeding are the original report, 164 I. C. C. 619 (Exhibit 6—R. 60, 77) and the supplemental report, 173 I. C. C. 511 (Exhibit 8—R. 60, 78). The third report, 205 I. C. C. 301, is referred to as the report on further hearing (Exhibit 10—R. 60, 79). See Appendix I, pages 53-57.

were published and filed with the Commission to comply with this order (R. 60). Excerpts from the Commission's reports and orders explaining certain of the principles underlying the revised rate adjustment, are set out in Appendix I, page 53.

Pertinent to the present controversy is the rule or regulation promulgated by the Commission in the report and order effective July 1, 1935, (205 I. C. C. 301) that the new rate-break combinations thereby prescribed (being the combinations of the newly prescribed local and proportional rates into and out of rate-break markets and proportional rate points such as St. Louis, Kansas City, etc.) must be the exclusive basis of charge on all shipments passing through a rate-break market when stopped in transit either at the rate-break market or at any other point on the route passing through the rate-break market. *The Grain Case*, 205 I. C. C. 301, 327, 342; 173 I. C. C. 511, 515, 516; 164 I. C. C. 619, 644, 645. Prior thereto both transit balances and proportional rates were available for application out of rate-break markets and proportional rate points.

The rule requiring that the new rate-break combinations must be the exclusive basis of charge on all shipments passing through a rate-break market did not apply to continuous shipments moving over the route through a rate-break market which were not stopped in transit at the market or at any other intermediate point on that route. In other words, when there existed two or more competitive routes between the same points and one of the routes passed through a rate-break market, the rule did not prohibit the higher-rated route through the rate-break market from meeting the competition of the lower-rated route which did not pass through the rate-break market provided the shipment moving over the higher-rated route through the rate-break market was not stopped in transit at any intermediate point on that route. For example, from Kansas City, Missouri, to Memphis, Tennessee, the

Missouri Pacific Railroad had a more direct route through Carthage, Missouri, which did not pass through St. Louis, a rate-break market, and a less direct route which passed through St. Louis. The prescribed rate over the route through Carthage was 18 cents, or 4 cents lower than the prescribed 22-cent rate-break combination rate over the route through St. Louis. The 22-cent rate-break combination rate was the combination of the prescribed 11-cent proportional rate from Kansas City to St. Louis and the prescribed 11-cent proportional rate from St. Louis to Memphis. The Commission explained the application of the rule in connection with the foregoing facts as follows:

> "* * * the rate of the Missouri Pacific from Kansas City to Little Rock or Memphis, through Carthage, Mo., may be applied over its route through St. Louis on a continuous shipment, but the higher combination on St. Louis must be charged on a shipment stopped at St. Louis *or other intermediate point on that route.* The purpose of the finding is to prevent the defeat of the proportional rate by a transit balance lower than the proportional, but not otherwise to curtail carrier competition. The restriction is laid on the intermediate points other than the market, as well as upon the market, in order not to discriminate against the market in favor of the other intermediate points." (Italics ours.) (*The Grain Case,* 173 I. C. C. 511, 516.)

Other illustrations in explanation of the rule were given by the Commission as the following excerpt from its report shows:

> "* * * the combination on Omaha from a point in Nebraska to Chicago may be applied through Kansas City on a continuous shipment, but the higher combination on Kansas City must be charged on a shipment stopped at Kansas City or other intermediate point on that route; the proportional rate from Omaha to Chicago may be applied through Kansas City on a continuous shipment, but the higher combination of proportional rates to and from Kansas City must

> be charged on a shipment stopped at Kansas City or other intermediate point on that route; * * *." (*The Grain Case*, 173 I. C. C. 511, 516.)

The rule that the rate-break combination must be the exclusive basis of charge on shipments moving over a route through a rate-break market and stopped in transit at the market or at any other intermediate point on that route was imposed upon the Rock Island and other carriers, as well as upon the shippers, effective July 1, 1935. *The Grain Case*, 205 I. C. C. 301. At page 342 of this report, made a part of the order, the Commission said:

> "In the original report (page 645) an exception to the rule for the exclusive application of the rate-break combinations was made in respect of shipments through a rate-break market to meet the carrier competition of a lower-rated route, provided the shipments were not stopped at the rate-break market or other intermediate point on the equalized route, the rate-break combination to apply on shipments stopped in transit on that route. That finding, as more fully explained in the supplemental report (page 515)[20] is adhered to."

THE FACTS RELATING TO THE TRANSPORTATION OF THE SHIPMENTS.

The facts were stipulated. During the crop season of 1935 numerous carloads of soft winter wheat moved from country points in Illinois and other States to St. Louis and,

20. "But transit may be permitted at an intermediate point other than the market, and not at the market, on the higher route when he intermediate transit point on the higher route is also a transit point on the direct route. For example, transit may be permitted at Fort Dodge, Iowa, but not at Omaha, on a shipment from Sioux City to Chicago, through Omaha and Fort Dodge, to meet the competition of a direct route from Sioux City through Fort Dodge to Chicago, with transit at Fort Dodge; or at Mankato, but not at Omaha or Sioux City, on the route from Kansas City to Minneapolis, through Omaha, Sioux City, and Mankato, to meet the competition of a direct route from Kansas City, through Des Moines and Mankato, with transit at Mankato; or at Cedar Rapids, but not at Omaha, on the route from Kansas City, through Omaha and Cedar Rapids to Chicago, to meet the competition of a direct route from Kansas City through Cedar Rapids to Chicago, with transit at Cedar Rapids."

upon arrival, were unloaded and stored in elevators. At the time of this movement into St. Louis petitioner had no connection whatever with any such shipments. It did not pay the freight charges and was neither the consignee nor the consignor (R. 49, 50).

The Southwest had short crops of hard winter wheat in 1934, 1935 and 1936. Wheat millers in Texas and Oklahoma during these years found it advantageous to purchase soft winter wheat on the St. Louis market and mix soft winter wheat and hard winter wheat in the manufacture of flour (R. 49).

The J. C. Crouch Grain Company purchased out of storage elevators in St. Louis, among others, 106 carloads of wheat. Beginning with July 19, 1935, and ending with August 9, 1935, these shipments so purchased were delivered to the Rock Island at St. Louis for transportation. The Rock Island did not handle any of the shipments inbound to St. Louis (R. 49). The consignors of the 106 shipments out of St. Louis were the Farmers National Grain Company, the Checkerboard Elevator Company and the Continental Export Company. Of the 106 shipments, 12 were consigned by the consignor to the consignor at Kingfisher, Oklahoma, notify petitioner, and 94 were consigned by the consignor to the consignor at Enid, Oklahoma, notify petitioner (R. 49).

The freight charges for the transportation of the 106 shipments of wheat from St. Louis to Enid and to Kingfisher were fully prepaid at St. Louis, that is, the freight charges due to the Rock Island under the tariffs for transportation from St. Louis to Enid and to Kingfisher were paid at St. Louis by the consignor and not by petitioner (R. 49). Upon arrival at Enid and Kingfisher the wheat was unloaded and placed in storage elevators (R. 49). To Enid and to Kingfisher the same rate applied from each country origin and to Enid and to Kingfisher from St. Louis the same proportional rate applied (R. 50).

After August, 1935, there were a number of cars of wheat delivered by the Union Equity Cooperative Exchange to the Rock Island at Enid for transportation to petitioner at Kingfisher where petitioner's flour mill is located (R. 47, 50). Upon arrival at Kingfisher the wheat was unloaded by petitioner and placed in storage elevators. As the same rate applied to Enid and to Kingfisher from St. Louis no freight charges were due for the transportation services from Enid to Kingfisher and no freight charges were paid by petitioner for such services (R. 50).

The wheat bought in St. Louis, or its equivalent in weight, was transported from country origin to St. Louis, from St. Louis to Enid and from Enid to Kingfisher and the freight charges for such services, although paid in full, were not paid by petitioner (R. 49, 50).

Following the arrival of the wheat at Kingfisher, petitioner, during the period beginning in August, 1935, and ending in 1936, tendered at different times 210 shipments of flour to the Rock Island for transportation to destination points in southern territory, being that territory generally south of the Ohio River and east of Memphis, Tennessee, and the Mississippi River.

According to petitioner's routing instructions issued at Kingfisher at the time of each shipment, the Rock Island was directed to transport the shipments over its own line to Memphis and there turn them over to other rail carriers, specified in each instance, for further transportation to destination. The balance of freight charges due in each instance for the transportation service from Kingfisher to destination was prepaid by petitioner to the Rock Island at Kingfisher. The only payments made by petitioner to the Rock Island or to any other carrier as compensation, in whole or in part, for the total transportation services from country points where the wheat originated to the destination points were the flour was delivered, were the

payments made by petitioner to the Rock Island at Kingfisher when the shipments of flour were tendered to the Rock Island for transportation from that point (R. 48).

The rate on grain and grain products to Memphis from Kingfisher, Enid, Ringwood and other Oklahoma group points was 34 cents per 100 pounds. On a shipment of wheat and flour originating at Ringwood, Oklahoma, for example, milled in transit at Kingfisher and destined Memphis, the shipper was required to pay a rate of 34 cents (Exhibit 21—R. 147). This 34-cent rate was prescribed as reasonable by the Commission for transportation to Memphis of grain and its products originating in Oklahoma. *The Grain Case*, 205 I. C. C. 301, 422, 423. Petitioner, however, did not pay the 34-cent rate from Kingfisher to Memphis on its flour shipments in question. The amount of freight charges prepaid by petitioner at Kingfisher on each of its flour shipments was predicated on the assumption that each flour shipment originated at country points beyond St. Louis and that the through rate to Memphis from the country origin points became applicable.

For example, on May 25, 1936, petitioner shipped a carload of flour weighing 59,115 pounds from Kingfisher to Knoxville, Tennessee (R. 53). Billing was presented at Kingfisher indicating the movement into Kingfisher of wheat of equivalent weight. Likewise, billing had been presented at St. Louis and again at Enid indicating that wheat of equivalent weight had originated at Ridge Farm, Illinois, Cowden, Illinois, and Culver, Illinois. While the transportation of the wheat shipments from origins to St. Louis, from St. Louis to Enid, from Enid to Kingfisher, and the transportation of the flour shipment from Kingfisher to destination in each instance was, in fact, complete in itself and while the four separate transportation services were, in fact, disconnected and independent of one another, the amount of the freight charges paid by

petitioner at Kingfisher for the transportation of this flour shipment was based on the theory that the shipment originated, not at Kingfisher, but at the three Illinois country points.

The rate from each of the three country points to Memphis over the route of movement was 45.5 cents, being the 11.5-cent rate inbound to St. Louis and the 34-cent proportional rate from St. Louis to Memphis. The rate from the country points to Kingfisher, theretofore paid by other parties, was 34 cents. The balance due for the further transportation from Kingfisher to Memphis was 11.5 cents per 100 pounds. The rate from Memphis to Knoxville was 26.5 cents per 100 pounds. Petitioner paid to the Rock Island at Kingfisher freight charges amounting to $224.63, $156.65 of which was for the transportation of 59115 pounds of flour from Memphis to Knoxville at the 26.5-cent rate and $67.98 of which was for the transportation of the shipment to Memphis from Kingfisher at the 11.5-cent balance.

The short single-line distance from St. Louis to Memphis is 305.6 miles and the short joint-line distance is 296.2 miles. The route of the Rock Island from St. Louis to Memphis extends west through Kansas City, southwest through Enid and Kingfisher, and east to Memphis, the distance over this Rock Island route being 1191.3 miles (R. 57).

The basis for petitioner's contention in this case is its claim that, at the time the shipments originated at country points beyond St. Louis, there was a proportional rate of 11 cents in effect over the route of the Rock Island from St. Louis to Memphis, and that petitioner, although its shipments were stopped and transited en route, nevertheless is entitled to have this 11-cent proportional rate applied as one of the factors to make up the combination through rate.

The rate assessed as the proper factor over the route of the Rock Island from St. Louis was 34 cents. In other words, instead of paying anything whatever for transportation from Kingfisher to destination, petitioner claims the

Rock Island owes it on each flour shipment 23 cents per 100 pounds, being the difference between the 34-cent proportional rate and the 11-cent proportional rate.

The 34-cent proportional rate assessed by the Rock Island from St. Louis to Memphis was the 14-cent proportional rate from St. Louis to Kansas City prescribed as reasonable by the Interstate Commerce Commission, and the 20-cent proportional rate* published by the Rock Island for application over its route from Kansas City to Memphis (Ex. 15, R. 111, Ex. 12, R. 81).

Prior to July 1, 1935, the Rock Island did not publish and never had published the going rates, local and proportional, from St. Louis to Memphis over its long route. The Interstate Commerce Commission has never required the Rock Island to publish over this long route the rates prescribed by it for application over the more direct routes from St. Louis to Memphis (R. 61). But after hearings extending over several years the Interstate Commerce Commission revised the entire grain rate structure in the West. (See Appendix I.) By its order the revised rates became effective July 1, 1935. The proportional rate prescribed at this time over the more direct routes from St. Louis to Memphis was 11 cents.

The setting out of all the prescribed revised rates in tariff form was a laborious task to be accomplished in a relatively short time and the Rock Island, by mistake, published the prescribed St. Louis to Memphis proportional rate for application over its long route. This mistake came to the attention of the Rock Island on August 3, 1935, and it immediately sought permission of the Interstate Commerce Commission by sixth section petition to cancel the application of the 11-cent proportional rate from St. Louis to Memphis over its route. On September 3, 1935, the In-

* The Interstate Commerce Commission prescribed as reasonable to Memphis from Kansas City a proportional rate of 18 cents, but the Commission did not require the Rock Island to publish this 18-cent rate from Kansas City to Memphis because of its more circuitous route.

terstate Commerce Commission granted permission to cancel the application of this rate and its application over the route of the Rock Island from St. Louis to Memphis and over any other route through Kansas City, Enid and Kingfisher from St. Louis to Memphis was cancelled on 10 days' notice, effective September 16, 1935 (R. 62).

It should be stated at this point that the Rock Island does not here and never has denied liability simply because this 11-cent rate crept into the tariffs by mistake. Petitioner's shipments, if regarded as through shipments, originated at country points beyond St. Louis and ended up at destinations in southern territory. On their way to destination they were unloaded at St. Louis. Later the shipments moved out of St. Louis to Enid and to Kingfisher where they were again unloaded. Thus 94 of the 106 shipments were stopped and transited at three different points en route and 12 were stopped and transited at two different points.

If the tariffs had not permitted transit under any conditions whatever, petitioner would have been required to pay on each shipment the local rate into St. Louis, the local rate from St. Louis to Enid and Kingfisher and the local rate from Enid and Kingfisher.

In addition to rate tariffs, the Rock Island also had a transit tariff (Ex. 17, R. 115). Transit may be taken only in the circumstances and under the conditions set out in such a tariff. When a shipment is not stopped in transit there is no occasion or necessity to examine the provisions of a transit tariff. If a shipment is stopped en route for storage or milling, the transit tariff contains the conditions which must be complied with in order that the right of transit may be exercised. The Rock Island transit tariff provided that when a shipment passes through or is stopped at points from which proportional rates are published it shall be charged the combination of rates to and from each

proportional rate point on the route of movement (Transit Tariff Item 20, Ex. 17, R. 117, 253).

St. Louis and Kansas City each was a proportional rate point. Petitioner's shipments stopped at St. Louis, Enid and Kingfisher, and passed through Kansas City. The combination of rates over the Rock Island to and from each proportional rate point between St. Louis and Memphis was the 14-cent proportional rate from St. Louis to Kansas City and the 20-cent proportional rate from Kansas City to Memphis, a combination rate of 34 cents. This 34-cent rate is the rate assessed by the Rock Island as a component factor of the through combination rate from country origins to final destinations.

METHOD OF PROCEDURE ADOPTED BY PETITIONER FOR RECOVERY OF DAMAGES.

The Interstate Commerce Act, Section 9 (Appendix III, p. 64) provides that any person claiming to be damaged by a common carrier subject to the Act "may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this part, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt."

Before bringing suit petitioner filed an informal complaint (Ex. 26, R. 180 to 186, inc.) with the Interstate Commerce Commission in which it raised the same issues as later it raised in Court and in which the grounds for recovery were the same. This informal complaint was placed on the Informal Docket of the Commission and given Docket No. 885276 (R. 63, Ex. 26, R. 179). Peti-

tioner alleged therein that "the through charge from origin of the wheat to destination of the flour should be computed on the basis of the 11-cent proportional rate from St. Louis to Memphis" (R. 181). Tariff Item 20 was referred to therein and petitioner asked the Commission to find "that the 11¢ rate may lawfully be applied to the movement during the period of time in which such rate is applicable via the route of the Chicago, Rock Island & Pacific Railway from St. Louis to Memphis via Enid and Kingfisher, Okla." (R. 186).

The Commission did not find for petitioner. Referring to Item 20 of the Tariff, the Commission said that under the terms of this item "it seems that the Kansas City combination would be applicable" (R. 187, 188).

Thereafter, Special Docket applications were filed with the Commission at petitioner's request (R. 63, 64) in which the shipments described and set out therein are the same as the shipments upon which recovery later was sought in Court. The one was docketed by the Commission as Special Docket No. 183006 (Ex. 27, R. 188 to 224, inc.), and the other as Special Docket No. 179345 (Ex. 28, R. 226 to 244, inc.). These Special Docket applications were denied, it being stated that after careful consideration it was the informal view of the Commission that the applicable rate had not been shown by the facts of record to have been unreasonable (R. 225).

It was not until after petitioner had proceeded before and felt out the Commission that it brought suit against the Rock Island in the District Court of Kingfisher County, Oklahoma (R. 8). The cause was removed to the United States District Court for the Western District of Oklahoma (R. 31).

After trial, the District Court found that the act of the Rock Island "in charging and assessing the said 34-cent rate as a component factor of the through rate applicable for the transportation of each shipment from the origin

beyond St. Louis to the destination beyond Memphis with transit at Enid, or at Kingfisher, or at both said points, was in accordance with the terms and requirements of the applicable tariffs and schedules of rates, charges and regulations published and on file with the Interstate Commerce Commission" (R. 254) and entered judgment in favor of respondents and against petitioner (R. 255).

Petitioner filed a motion to amend the findings of fact and conclusions of law, and a motion for a new trial. After argument on July 21, 1941, and on September 29, 1941, the District Court denied each motion (R. 255-260). Thereafter, on appeal, the Circuit Court of Appeals for the Tenth Circuit affirmed the judgment of the District Court (R. 271).

STATEMENT OF POINTS UPON WHICH RESPONDENTS RELIED IN THE CIRCUIT COURT OF APPEALS AND IN THE DISTRICT COURT.

Transit on the shipments in this case was not available on the 11-cent rate. The District Court so found (finding 13, R. 253) and this finding was upheld by the Circuit Court of Appeals (R. 263).

The shipments in this case do not come within the purview of the exception to Item 20 in the Transit Tariff and the rate of 34 cents over the Rock Island which was assessed was the lowest rate applicable as a component factor of the proper through rate. The District Court so found (findings 13, 14, 15—R. 253, 254) and this finding was upheld by the Circuit Court of Appeals (R. 269).

The order of the Interstate Commerce Commission in the *Grain Case*, effective July 1, 1935, required the application of the Kansas City combination of rates on shipments from points beyond St. Louis to Memphis or beyond when such shipments passed through Kansas City and were stopped at Kansas City or at St. Louis or at

any other intermediate point such as Enid or Kingfisher, and it would have been a violation of this order if the Rock Island, by tariff publication, had provided for the application of any rate lower than the 34-cent Kansas City combination rate. The *Grain Case,* 205 I. C. C. 301, 327, 342; 173 I. C. C. 511, 515, 516; 164 I. C. C. 619, 644, 645.

The filing by petitioner of its informal complaint with the Interstate Commerce Commission and the Special Docket applications filed with the Interstate Commerce Commission at petitioner's request constitute an election by petitioner under the provisions of Section 9 of the Interstate Commerce Act to have its cause of action adjudicated by the Interstate Commerce Commission. Having elected "one of the two methods of procedure" provided for in Section 9 by proceeding before the Commission, petitioner, under the provisions of Section 9, is denied the right to pursue any alternate remedy it might have had in Court.

For the reason that the determination of the issues called for technical knowledge pertaining to transportation, and for the further reason that there were contrary claims as to the peculiar meaning of words or expressions in the tariffs, the Interstate Commerce Commission had primary jurisdiction of the questions raised and a Court would have jurisdiction only when the Commission's decision was under attack. *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125, 139; *Armour* v. *Alton R. Co.,* 312 U. S. 195; *Standard Oil Co.* v. *United States,* 283 U. S. 235, 240; *Tex. & Pac. Ry. Co.* v. *Am. Tie Co.,* 234 U. S. 138.

The cause of action intended to be stated in petitioner's amended complaint is the cause of action created by Sections 8 and 9 of the Interstate Commerce Act. Such a cause of action must be filed either with the Commission

or, as specifically provided, in a Federal Court, and a State Court is without jurisdiction. *Penna. R. R.* v. *Puritan Coal Company,* 237 U. S. 121; *Penna. R. R.* v. *Clark Coal Company,* 238 U. S. 456; *Sullivan* v. *Missouri Pacific Lines,* 1 Fed. Supp. 803; *Lambert Co.* v. *B. & O. R. R. Co.,* 258 U. S. 377.

Petitioner is not entitled to recover freight charges which it did not pay to the carrier but which were paid to the carrier by other parties and which were the lawful charges due for the services fully performed in accordance with the transportation contract between the other parties and the carrier. *L. & N. R. R.* v. *Slauss-Sheffield Co.,* 269 U. S. 217; *Southern Pac. Co.* v. *Darnell-Taenzer Co.,* 245 U. S. 531; *Auburn Mills et al.* v. *Chicago & Alton Railroad Company et al.,* 222 I. C. C. 495.

The original petition filed by petitioner in the State Court failed to state a cause of action. If the amended complaint states a cause of action it is a different cause of action from that relied upon in the original petition. The facts are and the amended complaint shows on its face that it was filed more than three years after petitioner's shipments were delivered and the cause of action was barred. *Pittsburgh, etc. R. Co.* v. *Fink,* 250 U. S. 257; *Kansas City Southern* v. *Carl,* 227 U. S. 639, 653; *Phillips* v. *Grand Trunk Ry.,* 236 U. S. 662; *Kans. City So. Ry.* v. *Wolf,* 261 U. S. 133; *William Danzer Co.* v. *Gulf R. R.,* 268 U. S. 633.

ARGUMENT.

The petition does not allege any reason which would justify granting the writ. Petitioner's contention below and here is that the tariffs are ambiguous and in the petition there is reference to a rule that an ambiguity is to be resolved in favor of the shipper (petition, p. 5). The only reason alleged by petitioner in support of its request for review (petition, p. 5) is petitioner's statement that the Circuit Court of Appeals paid "lip service" to the rule by not upholding petitioner's contention as to ambiguity, and cases were cited announcing such a rule. The petition then states that the Circuit Court of Appeals decided this case contrary to the holdings in the cases cited.

Apparently petitioner has misconceived the purport of the decision which it is desired to have reviewed. In its decision the Court recognizes the rule but holds that it has no application to the facts in evidence. The Court did not decide the present case contrary to the holdings of the cases cited by petitioner. There was no similarity between the tariff provisions and other facts in the present case and the tariff provisions and other facts in the cases cited. In its opinion the Court refers to most of the cases cited by petition, and with approval.

The decision by a Court that the tariff provisions in evidence before it, in connection with other facts in evidence, are not ambiguous is not contrary to the holding in another case in which wholly different and dissimilar tariff provisions, in connection with different evidentiary facts, are held to be ambiguous.

In one of the cases cited by petitioner the Circuit Court of Appeals, Ninth Circuit, held that the tariffs in evidence before it were not ambiguous. *Southern Pacific Co.* v. *Lothrop*, 15 Fed. (2d) 486. The views expressed by that

Court deserve emphasis in connection with petitioner's contention as to ambiguity. At page 487 of its opinion the Court said:

> "We think that by unequivocal language the carrier expressed the intent that the rates in section 4 should apply only to shipments destined to the Hawaiian Islands; that is the natural and obvious import of the tariffs as a whole. **Astute ingenuity might succeed in reading ambiguity into the language, but the ordinary, intelligent shipper would find none.**" (Bold face type ours.)

PETITIONER'S POINT THAT ITEM 20 WAS NOT IN THE PROPER LOCATION IN THE TARIFF.

As to this point, the Circuit Court of Appeals said (R. 270) that item "was placed on page two of the document which bore the heading, 'APPLICATION OF TARIFF,' and in a left-hand column under the word 'SUBJECT' it was indexed in a predominantly perpendicular arrangement 'SHIPMENTS PASSING THROUGH OR STOPPED AT POINTS FROM WHICH PROPORTIONAL RATES ARE PUBLISHED.' "

An examination of the tariff discloses that on page 2 there is a table of contents showing the different subjects covered by the tariff items. A shipper desiring to use the tariff first determines its application. Under the subject "APPLICATION OF TARIFF" in the table of contents, attention is directed to Item 20 among others appropriately appearing under such a heading. (Exhibit 17—R. 117.)

It is strange that petitioner would be able to locate items in this tariff numbered in the 700s and not to be able to locate an item numbered 20 specifically designated as an item relating to the subject "shipments passing through or stopped at points from which proportional rates are published." Moreover, as appears on page 303 of the Com-

mission's report and order in the *Grain Case*, 205 I. C. C. 301, representatives of petitioner and of other Texas and Oklahoma shippers were among those represented at the hearings and must have been apprised of the requirements of the order and of the tariff provisions it would be necessary to publish so as to comply with the terms of the order.

PETITIONER'S POINT THAT UNDER THE EXPRESS LANGUAGE OF THE TARIFFS THE 11-CENT RATE WAS APPLICABLE WITH TRANSIT PRIVILEGES AT ENID AND KINGFISHER.

The District Court's findings in this connection are as follows:

> "(13) * * * The court further finds that under the terms of this Transit Tariff and other applicable tariffs and regulations of the Interstate Commerce Commission, transit on the shipments involved in this case was not available on the 11-cent rate." (R. 253.)
>
> "(14) The court finds that under the facts in evidence the exception to Item 20 quoted above does not apply, and the shipments in this case do not come within the purview of said exception." (R. 253.)
>
> "(15) That the said rate of 34 cents was the lowest rate applicable as a component factor of the proper through combination rate for the transportation of each of the shipments from the origin beyond St. Louis to the destination beyond Memphis, with transit at Enid, or at Kingfisher, or at both said points." (R. 253.)
>
> "(16) That at the time or times the shipments originated the said rate of 34 cents was the lowest rate applicable as a component factor of the proper through rate for the transportation of any carload shipment of grain or grain products from an origin beyond St. Louis to a destination beyond Memphis

when moving between St. Louis and Memphis over any route through Kansas City, Enid and Kingfisher with transit at Enid, or at Kingfisher, or at both said points." (R. 254.)

The decision of the Circuit Court of Appeals is to the same effect. Prior to the time petitioner instituted suit in court the Interstate Commerce Commission had found against petitioner on its informal complaint and on the Special Docket applications which were filed with the Commission at petitioner's request (R. 187, 188, 225).

The shipments in controversy first moved from country origins into St. Louis where the wheat was unloaded and stored in terminal elevators. Later the wheat in these shipments, or its equivalent in weight, was shipped to Enid and to Kingfisher where it was unloaded and stored in elevators. Thereafter the wheat was milled into flour and shipped to destination (R. 51, 52, 53). In point of fact, as distinguished from fiction, there was no continuity of movement. The shipments into St. Louis were wholly independent of and not connected in any way with the shipments from St. Louis to Enid or to Kingfisher. Likewise, the shipments from Enid to Kingfisher and from Kingfisher to destinations were disconnected and separate shipments. In other words, in fact as distinguished from fiction, the shipments out of St. Louis, the shipments out of Enid and the shipments out of Kingfisher were local shipments out of each of said points. The local rate, not a proportional rate or transit balance, must be applied on a local shipment unless there is a tariff provision granting the privilege of transit, the effect of which is to create the fiction of a continuous through movement.

While respondents' tariffs provided for transit they also named the conditions under which it became available. One of the conditions was that when transit is taken on a shipment passing through or stopped at a point from which proportional rates are published, the applicable

rate is the combination of rates to and from each proportional rate point on the route of movement. In the light of a fictional continuous movement, the shipments in question stopped at the proportional rate point of St. Louis, passed through the proportional rate point of Kansas City, and took transit at either Enid or Kingfisher, or at both said points. In such circumstances, the 34-cent Kansas City combination rate became applicable. The application of this 34-cent rate was expressly required when the shipments passed through one or more proportional rate points and were transited en route.

At the time the Rock Island and other carriers were preparing to publish tariffs setting out the rates, rules and regulations in compliance with the Commission's order in the *Grain Case,* effective July 1, 1935, the Rock Island had routes of its own or in connection with other carriers from origins to destinations which routes passed through proportional rate points and which were higher rated than the routes of other carriers from the same origins to the same destinations but not passing through the proportional rate points, and it desired to meet the competition of the lower-rated routes.

In order to meet such competition as was permitted and at the same time comply with the Commission's requirement, the Rock Island published Item 20 in its tariff (Exhibit 17, R. 115, 117).

The proportional rate over the direct routes from St. Louis to Memphis was 11 cents and the rate over the direct routes from Ridge Farm, Illinois, for example, through St. Louis to Memphis was 22.5 cents, being the combination of the 11.5-cent rate inbound to St. Louis and the 11-cent proportional rate outbound. The rate of the Rock Island from St. Louis to Memphis always had been higher than the going rate. But, when, following the revision, the 11-cent proportional rate from St. Louis to

Memphis showed up as applying over the Rock Island the result was that from St. Louis to Memphis the higher-rated Rock Island route through Kansas City was meeting the competition of the lower-rated and decidedly more direct routes, and that from Ridge Farm, Illinois, through St. Louis to Memphis the higher-rated route, of which the Rock Island through Kansas City was a part, was meeting the competition of the lower-rated direct routes.

Such competition, however, could be met only under the conditions prescribed by the Commission. If a shipment moved from origin to destination without stopping at any intermediate point en route the higher-rated route passing through one or more rate-break markets or proportional rate points could meet the competition of the lower-rated route. But if the shipment, when moving over the higher-rated route through one or more proportional rate points, was stopped it was necessary that the combination on each proportional rate point be charged. Item 20 was for this purpose.

Kansas City and St. Louis were rate-break markets and points from which proportional rates were published. Enid and Kingfisher were intermediate points on the Rock Island between St. Louis and Memphis and were intermediate points between Ridge Farm, Illinois, and Memphis on the route through St. Louis and Kansas City. Petitioner's shipments passed through St. Louis and through Kansas City, and were stopped at St. Louis, Enid and Kingfisher. Between St. Louis and Memphis over the Rock Island, "the combination of rates to and from each proportional rate point" (from Item 20) was the Kansas City combination, being the combination rate of 34 cents made up of the proportional rate of 14 cents from St. Louis to Kansas City and the proportional rate of 20 cents from Kansas City to Memphis. From Ridge Farm, Illinois, to Memphis through St. Louis and Kansas City the combination of rates to and from each proportional rate point was 45.5 cents made up

of the rate of 11.5 cents to St. Louis, the 14-cent proportional rate from St. Louis to Kansas City and the 20-cent proportional rate from Kansas City to Memphis.

In the circumstances set out above it would have been in violation of the tariffs to assess on petitioner's shipments any rate lower than the Kansas City combination rate of 34 cents from St. Louis to Memphis as a component factor of the proper through rate. And it would have been in violation of the tariffs to assess on petitioner's shipments from Ridge Farm, Illinois, as far as Memphis any rate lower than the St. Louis and Kansas City combination rate of 45 cents. These rates were charged as the tariffs required.

Moreover, had the Rock Island permitted by tariff the application of any other rates than the rates charged on shipments passing through St. Louis and Kansas City and stopped at St. Louis, or Enid, or Kingfisher, it would have been guilty of violating the order of the Interstate Commerce Commission and subject to severe penalties.

Even if two constructions of the tariffs in question were possible, preference should be given to that construction which does not result in violation of law. *Great Northern Ry. Co.* v. *Delmar Co.*, 283 U. S. 686.

During the short time the 11-cent rate was in effect over the Rock Island from St. Louis to Memphis, no shipper, other than petitioner, ever demanded its application over the Rock Island route. This rate was never applied for any shipper as one of the factors of the through combination rate on any shipment from or through St. Louis to or beyond Memphis over the route of the Rock Island or over any other route of which the Rock Island was a party (R. 62, 63).

Every other flour miller at such points as Oklahoma City or Enid, when shipping flour originating in Oklahoma to Memphis or to the Southeast, was obliged to pay the pre-

scribed 34-cent rate for transportation as far as Memphis. As it was unnecessary to maintain the identity of inbound wheat, a shipper was permitted to use any billing on hand when flour is shipped out. The effect of the construction placed upon the tariffs by petitioner is that petitioner would have been allowed the benevolent privilege of shipping its flour originating in Oklahoma to Memphis without paying any rate whatever and, in addition, the Rock Island would have been required to pay petitioner, each time petitioner shipped out a carload of flour, 11.5 cents out of freight charges which parties other than petitioner previously had paid.

As indicated by the decision of the Circuit Court of Appeals, petitioner there labored in an effort to distinguish between "passing through" as that expression is used in Item 20, and "moving through," and made what seems to be a rather absurd contention that the expression "passing through" refers to shipments passing through an elevator. But Item 20 deals with points "from which proportional rates are published" and with shipments passing through or stopped at such points. A point is a locality in which all of the mills, elevators, warehouses, etc., and the factories, plants, etc., of other shippers are included and usually embraces all of the territory within the municipal limits or within a more extensive switching district. Rates are not published from the plants of individual shippers.

In its report in the *Grain Case*, 205 I. C. C. 301, 342, the Commission said that the rate-break combinations must be the exclusive basis of charge on "shipments through the rate-break markets, * * *" and that the rule for the exclusive application of the rate-break combinations was made in respect of "shipments through a rate-break market * * *." Of course, the Commission was referring to shipments passing through a rate-break market. The petitioner would say that if the Commission had said "passing through" instead of "through" the reference would have

been to shipments passing through elevators and not through rate-break markets. Referring to gateways such as Kansas City, to traffic and to shipments, the Supreme Court in *Texas & Pacific Ry. Co.* v. *U. S.*, 289 U. S. 627, 639, speaks of "traffic passing through another" gateway and "too much traffic passes through" another gateway. Moreover, a shipment must be stopped and unloaded before it can be placed in an elevator. The stop is for the purpose of storing in an elevator or giving the shipment some other transit service.

The contention also is made that Enid, Kingfisher and other points on the Rock Island in Oklahoma were proportional rate points. It is doubtful that petitioner would present this contention to the Interstate Commerce Commission or to a group of shipper representatives who are familiar with tariff rates, rules and regulations, and understand the meaning and significance of words and expressions used in the trade. Neither Enid nor Kingfisher nor any other Oklahoma point on the Rock Island has proportional rates to any destination. They are not proportional rate points and are not known as such.

A proportional rate point is a point out of which an inbound shipment may move to destination on a proportional rate. There are no proportional rates out of Enid or Kingfisher or any of the other Oklahoma points out of which a shipment may move to destination on a proportional rate. If a shipment moved to Memphis as its destination from Kingfisher or Enid or any of the other Oklahoma points as origin points, it paid the local rate of 34 cents. If from the same origins it moved to Knoxville it paid the local rate, being a combination on Memphis. On the other hand, if a shipment inbound to Kansas City, later moved outbound to Memphis or to Knoxville it paid the proportional rate from Kansas City to Memphis or Knoxville, the proportional rate from Kansas City to Knoxville also being a combination rate. Moreover, the stipulation of facts (R.

58) expressly states that "proportional rate points are points having rates, among others, which are proportional on the origin end." Neither Enid nor Kingfisher nor any of the other Oklahoma points mentioned had rates proportional on the origin end.

In its report in the *Grain Case*, 173 I. C. C. 511, the Commission said that transit would be permitted at an intermediate point on the higher route through a market, but not at the market, when the intermediate transit point on the higher route through the market also was a transit point on the direct route which did not pass through the market. The Commission adhered to this rule in its report in the *Grain Case*, effective July 1, 1935 (205 I. C. C. 301, 342).

It was to take advantage of this rule that the exception to Item 20 was published. For example, the Frisco served St. Louis and Enid over a route which did not pass through Kansas City. The Frisco did not serve Kingfisher. However, the Fricso in connection with the Rock Island had a route from St. Louis through Enid to certain destinations on the Rock Island, including Kingfisher. Between St. Louis and Kingfisher through Enid this Frisco-Rock Island route did not pass through Kansas City or through any other point from which proportional rates were published. Enid was a transit point on this route. The route of the Rock Island between St. Louis and Kingfisher passed through Enid, but it also passed through Kansas City, and in this latter respect differs from the Frisco-Rock Island route. While a shipment moving between St. Louis and Kingfisher on the Frisco-Rock Island route could be given transit at Enid, transit could not, but for the departure, be given at Enid on a shipment moving over the Rock Island route through Kansas City. The departure from the rigid application of the rate-break principle allowed the Rock Island to meet the Frisco competition by providing in its tariffs for transit at Enid on a

shipment moving from St. Louis to Kingfisher as a destination over its route through Kansas City, and to charge the rate applicable to a shipment moving between the same points over the Frisco-Rock Island route, such charge being lower than the Kansas City combination.

Reading the exception to Item 20 in the light of the facts in the present case, the 11-cent rate from St. Louis to Memphis was the rate over the lower-rated direct route. When this 11-cent rate was published for application over the higher-rated Rock Island route, the lowest combination of rates from Ridge Farm, Illinois, through St. Louis direct to Memphis became applicable over a higher-rated route through the proportional rate points of both St. Louis and Kansas City.

The terms "latter route" and "another route," as used in the exception, referred to the higher-rated Rock Island route through St. Louis and Kansas City, and the term "route first described" refers to the lower-rated route through St. Louis direct. As provided in the exception, transit may be given at an intermediate point "on the latter route," being the higher-rated route through St. Louis and Kansas City, on the basis of the lowest rate, provided that the intermediate point at which transit is given on the higher-rated route also is a transit point intermediate on the lower-rated route. Enid and Kingfisher were intermediate transit points on the Rock Island between St. Louis and Memphis, but they were not points on any lower-rated direct route from St. Louis to Memphis and were not intermediate between St. Louis and Memphis on any such route.

Petitioner's shipments were stopped at St. Louis, Enid and Kingfisher on the higher-rated indirect route from origin to Memphis through St. Louis and Kansas City. This brought the shipments within the prohibition in the Commission's order at the outset. The shipments were

stopped in transit at intermediate points on the higher-rated route through one or more proportional rate points. The transit was given at points which were not intermediate on the lower-rated direct route. The exception to Item 20 did not come into play because transit was given at intermediate points on the higher-rated route but which were not intermediate points on the lower-rated direct route. In this connection the District Court found as follows:

> (Finding 14) "The court finds that under the facts in evidence the exception to Item 20 quoted above does not apply, and the shipments in this case do not come within the purview of said exception" (R. 253).

The Commission, it will be recalled, when acting upon petitioner's informal complaint and upon the special docket applications, said that the exception to Item 20 did not seem to have application (R. 187), that on shipments over the Rock Island which "passed through" Kansas City, the Kansas City combination would be applicable and that the applicable rate was not shown to be unreasonable (R. 225).

Petitioner says that in addition to the route of the Rock Island all the way, there were other routes from St. Louis to Memphis through Kansas City, Enid and Kingfisher. Reference is made to a route through Brinkley or North Little Rock, Arkansas and the Cotton Belt, and to a route through Helena, Arkansas and the Missouri & Arkansas R. R. This statement is based on what seems to be another rather individual and private construction of tariff provisions.

The Cotton Belt (designated in the tariff as StLSW) operates over the Rock Island tracks from Brinkley to Memphis, a distance of approximately 70 miles. Petitioner says that the 11-cent rate from St. Louis to Memphis was published over this Rock Island-Cotton Belt route. This is petitioner's interpretation of that part of the tariff providing routes over which the rates are made applicable. An examination thereof discloses that such an interpretation is

not justified. The 11-cent proportional rate from St. Louis to Memphis did not apply over any such route.

On page 54 of this tariff (R. 101, 103), under "Routing Instructions," it is provided that the rates named in the tariff "apply only via routes specified on pages 54 to 72, inclusive," subject to certain conditions not material here. In designating the points from and to which the routes are specified, it will be seen on page 56 that routes are specified between stations in Arkansas on the one hand and stations in Colorado, Kansas, Missouri and other states on the other hand; and that routes also are specified between Memphis on the one hand and the same stations in Colorado, Kansas, Missouri and other states on the other hand. For example, there is a clear demarcation between the routes specified from St. Louis, being a point in Missouri, to stations in Arkansas on the one hand and the routes specified from St. Louis to Memphis on the other hand. The specified routes are given numbers. For instance, the route from St. Louis on the Rock Island to Memphis on the Rock Island is shown to be Route 258, which is the Rock Island all the way. The space for the number of any route, if it existed, from St. Louis on the Rock Island to Memphis on the Cotton Belt, is blank. This positively indicates that there was no Rock Island-Cotton Belt route from St. Louis to Memphis. There being no Rock Island-Cotton Belt route specified from St. Louis on the Rock Island to Memphis on the Cotton Belt, the 11-cent rate from St. Louis was not applicable to Memphis in connection with the Cotton Belt.

Petitioner speaks of a route from St. Louis to Helena, Arkansas over the Rock Island all the way from St. Louis through Enid and Kingfisher to Wheatley, Arkansas and thence over the Missouri and Arkansas Railroad to Helena. Just why petitioner refers to this route is a quandary. It is not a route to Memphis. If the 11-cent proportional rate were published over such a route it would not help petitioner's argument. A shipment over this route, were the

11-cent rate to Helena applicable, would have to move over another route beyond Helena to reach Memphis, and even though no transit was given at any point, considerably more than 11-cents would be required to be paid from St. Louis through Helena to Memphis.

However, even if the tariff had specified a route from St. Louis to Memphis over the Rock Island to Brinkley and the Cotton Belt beyond or a route from St. Louis to Helena over the Rock Island to Wheatley and the M. & A. beyond, the exception to Item 20 would not have become applicable. In such a situation, assumed for the purpose of argument, the route from St. Louis to Kansas City through Memphis over the Rock Island and Cotton Belt, itself, would be a higher-rated indirect route meeting the competition of the lower-rated direct route from St. Louis to Memphis. Enid and Kingfisher also would be indirect points on the Rock Island-Cotton Belt route, but not indirect points on the lower-rated direct route in the same manner that Enid and Kingfisher, as intermediate points on the Rock Island from St. Louis all the way to Memphis, were not intermediate points on the lower-rated route from St. Louis direct to Memphis. A shipment moving over the Rock Island-Cotton Belt route with transit at Enid and Kingfisher would be required to pay the combination on Kansas City or the combination to and from each proportional rate point on the route of movement, and the combination rate required to be paid would be "the lowest rate applicable."

If petitioner's shipments through St. Louis and Kansas City to Memphis had not moved all the way over the Rock Island, but, after being stopped for transit at Enid and Kingfisher on the Rock Island, had been routed from Kingfisher so as to move over the Cotton Belt from Brinkley, the same combination rate would have been assessed as was charged. Likewise, and for the same reasons, the same combination rate would have been assessed as was charged

had plaintiff's shipments moved from St. Louis to Helena over the Rock Island-M & A Route.

Petitioner says that the Rock Island construed Item 20 one way when Enid was the transit point and Kingfisher the destination, and another way when Kingfisher was the transit point and Memphis the destination. This is not the fact. The proportional rate from St. Louis to Enid and to Kingfisher was 20 cents and this also was the proportional rate from Kansas City to Enid and Kingfisher. After the shipments were delivered at Enid and placed in elevators, the Rock Island did not know to what point or points any of the shipments later would move. If later they moved to a destination to which the St. Louis proportional rate applied and to which, under the departure made by the Interstate Commerce Commission, the Rock Island was permitted to grant transit at Enid, there would be no additional charges due. Likewise, when the shipments moved from Enid on to Kingfisher, there was no absolute certainty that they would move out of Kingfisher, and if later they were moved out of Kingfisher, their destination, of course, was not known at the time they moved into Kingfisher and at the time the charges would be assessed if Kingfisher was the destination. After reaching Kingfisher, the shipments might move as flour or as wheat to another point to which the 20-cent proportional rate to St. Louis also applied, over a route at which transit at Enid and Kingfisher was available.

On several pages of the petition a statement appears to the effect that respondents have admitted this or conceded that with the likely intention perhaps of creating an inference that a particular admission or concession was made in the spirit of guilt and that it is particularly damaging. As stated at the outset the facts were stipulated by the parties and if there is anything in the stipulation which properly may be called an admission or a concession, it is an admission or a concession not only by respondents but as well by petitioner. In entering into the stipulation it

was the intention of respondents that it should recite the facts and, it being a stipulation, the facts so recited are conceded and admitted to be the facts by both petitioner and respondents.

Petitioner says the Rock Island does not take issue with its contention that the 11-cent rate would have been applicable if transit had been taken beyond St. Louis and not at either Enid or Kingfisher. This is an incorrect statement. In making it petitioner overlooks the fact that the shipments were stopped at St. Louis, a proportional rate point. Having stopped at St. Louis and later having moved through Kansas City, the combination of rates to and from each proportional rate point on the route of movement became applicable.

Petitioner says, at page 18, that Item 20 became troublesome and was shortly cancelled out. This is an erroneous statement and that it is erroneous was brought to petitioner's attention in the Courts below. The fact is, as the public records of the Interstate Commerce Commission show, that Item 20 was not cancelled effective November 5, 1935, as petitioner represents to this Court. The Rock Island did file a supplement to its Freight Tariff No. 34562 (Exhibit 17) effective November 5, 1935, in which, among others, a provision was published purporting to cancel Item 20 in the main tariff. **But the Interstate Commerce Commission, on November 4, 1935, entered an order suspending this supplement and providing for a hearing concerning its lawfulness.** The Interstate Commerce Commission's proceeding in which the order was entered suspending this supplement and instituting an investigation concerning its lawfulness was Investigation and Suspension Docket No. 4152. Thereafter this cancellation supplement itself was cancelled by a later supplement filed by the Rock Island. The provisions of Item 20 continued in effect as Item 20 until April 1, 1936, and subsequent thereto Item 20 became Items 18 and 19 in another transit tariff having the same application as the tariff it supplanted.

PETITIONER'S POINT THAT THE TARIFFS REQUIRE THE APPLICATION OF THE 11-CENT RATE BECAUSE THEY ARE AMBIGUOUS.

As appears from the previous discussion herein, both the District Court and the Circuit Court of Appeals held against petitioner on this point. And, with reference to Item 20, the Interstate Commerce Commission said that, not the 11-cent rate but the 34-cent Kansas City combination rate, was applicable. Item 20 is a provision contained in a transit tariff. It is only when transit is taken on a shipment en route that a transit tariff and its provisions come into play and are engaged. A transit tariff does not apply, does not grant any rights or privileges and need not be examined unless a shipment is transited. In other words, the application of any transit tariff provision depends upon whether or not the shipment has been stopped for transit.

If transit is taken the transit tariff names the conditions upon which transit is available. Item 20 would not be applicable unless transit was taken. Transit having been taken en route on a shipment passing through or stopped at points from which proportional rates are published, Item 20 provided that such shipments "shall be charged the combination of rates to and from each proportional rate point on the route of movement" unless the facts surrounding the transportation of the shipment bring it within the exception to Item 20.

Although petitioner's shipments were stopped at the proportional rate point of St. Louis, passed through the proportional rate point of Kansas City and were transited at Enid and Kingfisher, petitioner seeks to evade paying the combination of rates to and from each proportional rate point on the route of movement by the contention that the exception to Item 20 is ambiguous, should be construed

as nullifying the entire item and as nullifying the requirement that the said combination of rates shall be charged.

The exception to Item 20 refers to a route to and from one proportional rate point over which the lowest combination of rates applies and to "another route which passes through one or more proportional rate points." In the present case the route to and from one proportional rate point over which the lowest combination of rates applies was the route from country origins to St. Louis and thence over the direct lines to Memphis (from St. Louis to Memphis over the short single line the distance is 305.6 miles and over the Rock Island through Kansas City, Enid and Kingfisher the distance is 1191.3 miles—R. 57). The rate from country origins over this first route through St. Louis was the combination rate of 11½ cents inbound and the 11-cent proportional rate outbound, or 22½ cents. This 22½-cent combination rate was the lowest combination rate between country origins and Memphis over the route to and from the proportional rate point of St. Louis. When the 11-cent proportional rate from St. Louis to Memphis slipped into the tariffs over the higher-rated Rock Island route between St. Louis and Memphis, the "lowest combination of rates via a route to and from one proportional rate point" was "published for application over another route which passes through one or more proportional rate points." In such an event the exception to Item 20 provided that transit might be given at intermediate points on the latter route on the basis of the lowest rate applicable provided that the intermediate point at which transit was taken also was an intermediate point on the first route. Petitioner's shipments were transited at Enid and Kingfisher. Neither Enid nor Kingfiser was an intermediate point on the first route. As the District Court found, the exception to Item 20 "does not apply, and the shipments in this case do not come within the purview of said exception" (R. 253). In upholding this finding of the District

Court, the Circuit Court of Appeals said: "Since Kingfisher was not a transit point intermediate on either of the lower-rate or more direct routes the exception was inapposite" (R. 269).

THE JUDGMENT ENTERED IN FAVOR OF RESPONDENTS AND AGAINST PETITIONER IS SOUND NOT ONLY FOR THE REASONS HERETOFORE STATED BUT ALSO FOR THE FOLLOWING REASONS PRESENTED TO THE COURTS BELOW BUT NOT DISCUSSED BY THE CIRCUIT COURT OF APPEALS:

(A) THE INTERSTATE COMMERCE COMMISSION HAD PRIMARY JURISDICTION TO DETERMINE THE ISSUES RAISED IN THE PRESENT CASE AND A COURT WOULD HAVE JURISDICTION ONLY WHEN THE COMMISSION'S DETERMINATION WAS UNDER ATTACK.

Courts may not, as an original question, exert authority over subjects which primarily come within the jurisdiction of the Commission. *Tex. & Pac. Ry. Co.* v. *Am. Tie Co.*, 234 U. S. 138. In the case cited the shipper brought suit in the Federal Court against carriers to recover damages alleged to be the result of the carriers' refusal to furnish cars for the shipment of oak crossties. A motion was made by the carriers to dismiss because the evidence showed that the court had no power to consider and decide the subject matter or to award the relief prayed for.

The motion to dismiss was denied and its denial was assigned as error. It appeared that the shipper theretofore had filed an informal complaint with the Commission on the ground, as alleged, that although the Railway Company's tariff on lumber embraced crossties, it had announced its intention not to accept crossties on the lumber rate. The shipper contended that the primary jurisdiction doctrine had no application because oak crossties plainly took the

lumber rate and there was no reason for proceeding primarily before the Commission because there was no possibility of difference of opinion if the question were left to the consideration of the court. The Supreme Court, however, reversed the lower court and held that the lower court's denial of the motion to dismiss for want of jurisdiction was error. At page 146 the court said:

> "And it is equally clear that the controversy as to whether the lumber tariff included crossties was one primarily to be determined by the Commission in the exercise of its power concerning tariffs and the authority to regulate conferred upon it by the statute. Indeed, we think it is indisputable that that subject is directly controlled by the authorities which establish that for the preservation of the uniformity which it was the purpose of the Act to Regulate Commerce to secure, the courts may not as an original question exert authority over subjects which primarily come with the jurisdiction of the Commission."

In the present case the lower court also denied respondents' motion to dismiss on jurisdictional grounds such as were before the Supreme Court in the case cited above.

The primary jurisdiction doctrine is now firmly established. *Rochester Telephone Corp.* v. *U. S.*, 307 U. S. 125; *Armour* v. *Alton R. Co.*, 312 U. S. 195. Referring to this principle of law the court said in the Rochester Telephone case at page 139:

> "Thereby matters which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked."

Petitioner asks the court to place the construction upon the tariff for which it contends. Petitioner's contention requires consideration of facts, expert knowledge of the technical meaning of words, their significance as used in the trade and an appreciation of the incidents which call for their use.

In *Standard Oil Co.* v. *U. S., supra,* the shipper called upon the court to consider certain tariff provisions. Its complaint involving the same subject matter previously had been dismissed by the Commission. *Standard Oil Co.* v. *Carriers,* 139 I. C. C. 297. The court was asked to construe certain tariff items among which were two so-called intermediate rules reading as follows:

> "To or from points where rates are not specifically named in this tariff, but which are directly intermediate to or from points having specific rates, the rate to apply will be the rate as named to or from the first specified point beyond the point not having a specific rate.
>
> * * * * *
>
> "Except as otherwise specifically provided for herein, the rate to any point of destination not specifically provided for, the following will govern:
>
> "1. If point of destination is located directly between two stations to which different rates are named, the rates will be the same as to the one of the two stations between which it is directly located to which higher rates are named.
>
> "2. If point of destination is located directly between two stations to which the same rates are published, such rates will also apply to the intermediate station.
>
> "3. If point of destination is not located between two stations to which specific rates are named, the rates to the next more distant station beyond located on the same railroad as the intermediate station, will apply."

It was held by the court that the determination of such a question must be left to the Commission. At pages 238 and 239 the court said:

> "The case before the Commission did not, as contended, involve merely the construction of the written words employed in a rate tariff—a simple question of law—but required consideration of matters of fact and the application of expert knowledge for the ascertainment of the technical meaning of the words and a

correct appreciation of a variety of incidents affecting their use. It is evident from an inspection of the record, as the Commission in its first report said, that 'both cases concern unusually complicated and technical tariff situations,' the proper determination of which called for the exercise of the trained judgment of that body of experts, 'appointed by law and informed by experience.' "

The following questions, among others, raised by petitioner indicate that the subject matter of the present controversy is one over which primary jurisdiction is in the Commission. They show the position of petitioner to be that, in the interpretation of the tariff in question, there are involved issues of fact relating to the peculiar meaning of words and requiring expert knowledge thereof or the receiving of evidence by experts to ascertain and appreciate their technical meaning and use:

What is a proportional rate?

Is a rate local at the point from which it applies known or commonly referred to as a proportional rate?

What is a proportional rate point?

Is a point known as a proportional rate point if there is published from that point a rate local to that point but proportional on the point to which the rate applies?

Are Enid, Kingfisher and other stations in Oklahoma known as proportional rate points or points from which proportional rates are published?

Is Kansas City known as a proportional rate point or a point from which proportional rates are published so as to require the application of the Kansas City combination on petitioner's shipments from St. Louis to Memphis?

Were there proportional rates from Kansas City to the destination of petitioner's shipments?

Does a point having one proportional rate thereby have a proportional rate to every town in the United States?

Does the expression "points from which propor-

tional rates are published" mean or refer to points from which proportional rates are published to the destination of the shipments or is it sufficient that the point have but one proportional rate no matter whether or not it is published to the particular destination or not?

Does "passing through" as used mean or refer to shipments passing through an elevator or mill, or does it mean shipments transported over railroads passing through points or localities on the line?

Is there any distinction in the trade between "passing through" and "moving through"?

Petitioner says there was an ambiguity, but would there appear to be an ambiguity if there were evidence that the words used had a well understood meaning in the trade and among the Interstate Commerce Commission, shippers, railroads and tariff compilers?

Was there a Rock Island-Cotton Belt route or a Rock Island-M. & A. route provided in the tariff from St. Louis to Memphis over either of which the 11-cent rate applied?

Moreover, it will be recalled that when the shipments in the present case moved out of St. Louis the shippers at St. Louis named Enid and Kingfisher as the destinations. The transportation contract at that time was between the consignors at St. Louis and the Rock Island. That contract was completed upon delivery at Enid and Kingfisher. The shipments were consigned by the consignors to themselves at destination. The consignors, not petitioner, prepaid the freight charges in full for the transportation service they requested and the transportation service requested by the consignors was performed in full. Petitioner now asks that a part of the charges paid to the Rock Island at St. Louis by other parties be turned over to it as damages.

Whether or not petitioner is entitled to a part of the freight charges so paid in such circumstances calls for technical knowledge pertaining to tariffs and transporta-

tion and at the least presents an administrative question involving reasonableness and discrimination over which the Commission has primary jurisdiction. In *Armour* v. *Alton R. Co., supra,* the action of the District Court in dismissing the complaint was affirmed. The Supreme Court discussed several questions said to relate to complex transportation problems and held by the court to call for the application of the primary jurisdiction principles. Among such questions was the following discussed at page 201:

> "Fifth. The complaint shows that there is no provision in the tariff which would authorize the railroads to make refunds to petitioner of those charges paid by petitioner to the Stock Yards Company. Such refunds, if made, would be in the nature of special allowances not authorized by the tariff. A court's adjudication of this question in this case would not uniformly benefit all shippers for whom respondents have transported livestock. Whether or not such a refund would amount to a discrimination should be determined by studies such as those the Interstate Commerce Commission is especially empowered to make."

Administrative questions within the primary jurisdiction of the Commission relate not only to the reasonableness of rates and discrimination, but also to any practice which gives rise to the application of a rate. *Northern Pacific Ry. Co.* v. *Solum,* 247 U. S. 477.

(B) THE FILING BY PETITIONER OF ITS INFORMAL COMPLAINT WITH THE INTERSTATE COMMERCE COMMISSION AND THE SPECIAL DOCKET APPLICATIONS FILED WITH THE INTERSTATE COMMERCE COMMISSION AT PETITIONER'S REQUEST CONSTITUTE AN ELECTION BY PETITIONER UNDER THE PROVISIONS OF SECTION 9 OF THE INTERSTATE COMMERCE ACT TO HAVE ITS CAUSE OF ACTION ADJUDICATED BY THE INTERSTATE COMMERCE COMMISSION. HAVING ELECTED "ONE OF THE TWO METHODS OF PROCEDURE" PROVIDED FOR IN SECTION 9 BY PROCEEDING BEFORE THE COMMISSIONER, PETITIONER UNDER THE PROVISIONS OF SECTION 9 IS DENIED THE RIGHT TO PURSUE ANY ALTERNATE REMEDY IT MIGHT HAVE HAD IN COURT.

Petitioner's informal complaint filed with the Commission refers to the 34-cent Kansas City combination rate (R. 186) from St. Louis to Memphis. It complained therein of overcharges alleging that the charges collected on its shipments are "inapplicable and unreasonable" (R. 181) and that the tariff provides for the application of the 11-cent rate over the Rock Island from St. Louis ex beyond to Memphis with transit at Enid and Kingfisher (R. 185). The special docket applications filed with the Commission at petitioner's request set out and described the same shipments which are set out and described in the original petition later filed by petitioner in court.

The Commission denied the informal complaint and the special docket applications stating that the Kansas City combination rate was applicable (R. 188) and "that the applicable rate has not been shown by the facts of record to have been unreasonable" (R. 225). Thereafter petitioner instituted this suit in court.

The collection of charges for transportation services by a carrier in excess of the lawful rate is a violation of Section 6 (7) of the Interstate Commerce Act. Section 8 of the Act provides that a carrier violating the Act "shall be liable to the person or persons injured thereby for the

full amount of damages sustained in consequence of any such violation * * *."

The Commission by virtue of Sections 8 and 9 of the Act had jurisdiction to entertain and adjudicate overcharge claims. *M. K. T. R. Co.* v. *Sinclair*, 112 Fed. (2d) 553; *Standard Oil Co.* v. *U. S.*, 283 U. S. 235. If petitioner was overcharged it was damaged to the extent of the overcharges and petitioner invoked the jurisdiction of the Commission to adjudicate its cause of action for damages by reason of alleged overcharges on the shipments involved in this case when it filed its informal complaint with the Commission and when the special docket applications were filed with the Commission at petitioner's request.

Section 13 (1) of the Act provides that any person, etc., complaining of any violation of the Act, may apply to the Commission by petition which shall briefly state the facts. Section 17 (1) of the Act during the time or times in question provided that the Commission might make or amend such general rules as may be requisite for the order and regulation of proceedings before it.

The Rules of Practice before the Commission in proceedings under the Act were offered in evidence. (Exhibit 29.) Rule III thereof relates to complaints. (Appendix II.) At the outset this rule provides that complaints may be either informal or formal. By Subdivision (a) it is provided that informal complaints may be made by letter or other writing. Subdivision (b) recites that this informal procedure has been found efficacious in a great majority of cases and is recommended. No form of informal complaint is prescribed; Subdivision (c). Subdivision (f) relates to "Special docket applications." It is provided that such applications will be filed on the special docket under serial number, and, if granted, orders to that effect will be entered on the special docket. Subdivision (g) reads as follows:

"(g) (*Six months' rule for resubmission on informal or formal docket.*) If an informal complaint for

recovery of damages cannot be disposed of informally, or is denied on the informal docket, or is by complainant withdrawn from further consideration, the parties affected will be so notified in writing by the Commission. In any such case the matter will not be reconsidered unless, within six months after the date of mailing such notice to complainant, it is resubmitted on the informal docket or formal complaint is filed. Such resubmission or filing will be deemed to relate back to the date of filing the informal complaint, but reference to that date and the Commission's file number covering the informal complaint must be made in such resubmission or in the formal complaint filed. If within such six months the matter is not so resubmitted or formal complaint filed, the complainant will be deemed to have abandoned the complaint, and no complaint for recovery of damages based on the same cause of action will thereafter be placed on file or considered unless itself filed within the statutory period."

In *Tennessee Eastman Corporation* v. *L. & N. R. R. Co. et al.*, 198 I. C. C. 639, 640, the Commission, Division 5, had the following to say on the question of the effect of its orders in special docket applications:

"Our orders in special-docket cases must be regarded as formal orders as fully in all respects as our orders in formal cases. Such orders are based on provisions of law and of necessity must meet all legal requirements the same as orders in formal proceedings. *Swift & Co.* v. *C. & A. R. Co.*, 16 I. C. C. 426, 428-429."

The proceeding above was reopened for reconsideration upon the record as made only in so far as it related to reparation. 203 I. C. C. 436. The following is an excerpt from page 437 of the report of the Interstate Commerce Commission on reconsideration:

"The question of the effect of our orders in special-docket cases was carefully considered in *Swift & Co.* v. *Chicago & A. R. Co.*, 16 I. C. C. 426, wherein it was said:

'The act confers upon the commission authority to investigate complaints alleging unreason-

able charges, and, after full hearing on formal complaint, to condemn such charges as are found to have been unreasonable, to award reparation thereunder, and to prescribe a reasonable charge for the future. Out of this authority springs the right to condemn a charge as unreasonable, to award reparation thereunder, and to prescribe the charge for the future in so-called informal cases in which the parties present to the Commission an agreed statement of facts which, if presented in a formal complaint, would lead the Commission to take the same action. No reparation is or should be awarded on such informal proceedings which would not be awarded under the same set of facts in a contested case and in face of the defendant's opposition instead of its admission. The Commission can not and will not accept as conclusive any stipulation of parties as to the reasonableness of a rate or a transportation regulation. The Commission's conclusions on such matters must be reached with a due consideration for the conclusions which it has already announced on the same subject and for the knowledge which it has gathered with relation thereto in other cases and investigations. The willingness of a shipper to receive, and of a carrier to pay, reparation upon certain traffic or under certain rates can be approved by this Commission only under a clear and decisive showing of facts which would lead the Commission to award that reparation in opposition to that carrier's wishes, and under which it would also award reparation to all others who might have shipped during the same period under the same rate and under substantially similar circumstances and conditions.' "

The Commission and the courts hold that informal complaints and special docket applications toll the statute of limitations. In *Kile* v. *A. T. & S. F. Ry. Co., et al.*, 213 I. C. C. 461, the Commission's authority to provide by rule that the filing of an informal complaint shall have the effect of tolling the statute of limitations was challenged. The

defendants contended that there was no provision in the Act authorizing the filing of an informal complaint. At page 462 the Commission said:

> "Our authority to prescribe rules of practice to govern the conduct of proceedings before us is contained in section 17 of the act. We are authorized to conduct our proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. To that end we have provided by our Rules of Practice, among other things, for the filing of both informal and formal complaints. Our practice has been uniform and is well understood. For the purpose of tolling the statute pending consideration and the entering of an order by us, an informal complaint has the same force and effect as a formal complaint. Section 16 (3) does not refer to any certain kind of complaints nor define their form or the method of handling them. Informal complaints are designed to accomplish the adjustment of grievances where there is no serious controversy between the parties as to the subject matter at issue. Rule III of our Rules of Practice has for its purpose the fixing of a reasonable time for the resubmission of the subject matter complained of, and provides that a resubmission or filing will be deemed to relate back to the date of filing the informal complaint, but reference to that date and the Commission's file number covering the informal complaint must be made in such resubmission or in the formal complaint filed. Rule III of the Rules of Practice was fully complied with. The formal complaint was not barred."

Special docket applications also are held by the Interstate Commerce Commission to have the effect of tolling the statute. In *Elgin Butter Tub Co.* v. *Ann Arbor R. Co.*, 213 I. C. C. 735, 736, the Interstate Commerce Commission, Division 3, said:

> "Under the provisions of rule III(f) of our Rules of Practice, a carrier seeking to toll the statute may do so by filing a statement setting forth the facts, but in so doing it must act as agent for the party entitled to the reparation. As previously indicated, an informal

> complaint covering the shipments was filed by complainant in its own behalf within the statutory period, and at its request the carriers seasonably filed statements setting forth the facts as to the shipments, and had the claims registered in the name of complainant. It is our view that the entry of these claims on our special docket by defendants within the statutory period inured to the benefit of complainant herein, the real party in interest."

The special docket applications in the present case, filed at petitioner's request, were verified by petitioner. If there were any element of a technical nature lacking in petitioner's informal complaint to prevent its being treated as an informal complaint, which we deny, any deficiency is supplied by the special docket applications which acquainted the Interstate Commerce Commission with all of the facts it would require to be alleged in a formal complaint. In any event, petitioner is the last person who should be heard to object to the form as well as the substance of its own pleadings. Apparently the Interstate Commerce Commission waived the defects, if any, and the waiver was acquiesced in by all parties. It is a certainty that when it was before the Interstate Commerce Commission petitioner did not object to any waiver of defects.

In *M.-K.-T. R. Co.* v. *Sinclair*, 112 Fed. (2d) 553, 557, the court held that certain statements, treated by the Commission as a complaint under Rule III and registered under a special docket number, were sufficient to invoke the jurisdiction of the Commission and to toll the statute of limitations.

The filing of an informal complaint or of a special docket application calling upon the Commission to exercise its jurisdiction to award damages is the bringing of an action before the Commission and constitutes the election and adoption of this method of procedure to recover damages resulting from a violation of the Act. There were two methods available if the Act has been violated and a person

seeks to recover damages. The election and adoption of the one method is required to the exclusion of the other method.

Section 9 is set out in Appendix III. This section provides that any person claiming to be damaged by a carrier subject to the Act "may *either* make complaint to the Commission * * * *or* may bring suit * * * in any District or Circuit Court of the United States of competent jurisdiction; *but* such person or persons shall not have the right to pursue both of said remedies, and must in each case *elect* which one of the two methods of procedure * * * he or they will *adopt.*" (Italics ours.)

To recover damages for a violation of the Act there were available to petitioner two methods of procedure, the one by making complaint to the Commission and the other by bringing suit in court. The election and adoption of one of the two methods were required. When that election and adoption were made petitioner is denied the right to follow the other method.

Petitioner, having elected to invoke the Commission's jurisdiction and having adopted that method of procedure for the recovery of its damages, waived its right to follow the alternate method of procedure by bringing suit in court and the court is without jurisdiction.

Prior to bringing suit in court the shipper, in *Standard Oil Co.* v. *U. S.*, 283 U. S. 235, had made complaint to the Commission for the recovery of freight charges alleged to have been in excess of the lawful rate. After hearing, the Commission refused to award damages and dismissed the complaint. The shipper thereupon brought suit in court. The court held that the lawsuit in effect was one to obtain the same relief the shipper had failed to secure from the Commission. With reference to Section 9, the court said at page 241:

> "In substance and in principle the claim before the Commission and the claim before the court were the same, and the district court was without authority to entertain the controversy."

The Supreme Court considered the provisions of Sections 8 and 9 in *B. & O.* v. *Brady*, 288 U. S. 448, 456. At page 458 of its opinion the court said:

> "It is to be remembered that, by electing to call on the Commission for the determination of his damages, plaintiff waived his right to maintain an action at law upon his claim."

Referring to Section 9 of the Act, the court in *Hormel & Co.* v. *C. M. & St. P. Ry. Co.*, 283 Fed. 915, said at page 920:

> "The election which the section requires would become a mere form to test the judgment of the Commission for a short period, and if the ruling was adverse the other method would then be seized upon for the remainder of the two years."

(C) THE CAUSE OF ACTION INTENDED TO BE STATED IN PETITIONER'S AMENDED COMPLAINT IS THE CAUSE OF ACTION CREATED BY SECTIONS 8 AND 9 OF THE INTERSTATE COMMERCE ACT. SUCH A CAUSE OF ACTION MUST BE FILED WITH THE COMMISSION OR, AS SPECIFICALLY PROVIDED, IN A FEDERAL COURT, AND A STATE COURT IS WITHOUT JURISDICTION.

A State Court did not have jurisdiction. *Penna. R. R.* v. *Puritan Coal Company*, 237 U. S. 121; *Penna. R. R.* v. *Clark Coal Company*, 238 U. S. 456; *Sullivan* v. *Missouri Pacific Lines*, 1 Fed. Supp. 803; *O'Donnell* v. *Great Lakes Dredge and Dock Co.* (decided Feb. 1, 1943). As the State Court did not have jurisdiction of the subject matter, the lower court did not acquire jurisdiction by removal even though in a like suit originally brought there a Federal Court might have had jurisdiction. *Lambert Co.* v. *B. & O. R. R. Co.*, 258 U. S. 377.

(D) PETITIONER IS NOT ENTITLED TO RECOVER FREIGHT CHARGES WHICH IT DID NOT PAY TO THE CARRIER BUT WHICH WERE PAID BY OTHER PARTIES AND WHICH WERE THE LAWFUL CHARGES DUE FOR THE SERVICES REQUIRED BY THE TRANSPORTATION CONTRACT.

If petitioner contends that it bore the freight charges prepaid by the St. Louis shippers, then the purchasers of petitioner's flour located at southeastern destination points really bore the charges which petitioner prepaid at Kingfisher as well as the charges which were prepaid at St. Louis, and the purchasers from petitioner would be the parties, if any, entitled to recover damages. *L. & N. R. R.* v. *Slauss-Sheffield Co.*, 269 U. S. 217; *Southern Pac. Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 531; *Auburn Milles, et al.* v. *Chicago & Alton Railroad Company, et al.*, 222 I. C. C. 495.

(E) THE ORIGINAL PETITION FILED BY PETITIONER IN THE STATE COURT FAILED TO STATE A CAUSE OF ACTION. IF THE AMENDED COMPLAINT STATES A CAUSE OF ACTION IT IS A DIFFERENT CAUSE OF ACTION FROM THAT RELIED UPON IN THE ORIGINAL PETITION. THE FACTS ARE AND THE AMENDED COMPLAINT SHOWS ON ITS FACE THAT IT WAS FILED MORE THAN THREE YEARS AFTER PETITIONER'S SHIPMENTS WERE DELIVERED AND THE CAUSE OF ACTION WAS BARRED.

The original petition filed in the State Court was based upon the misquotation of an interstate rate and upon estoppel. As such it does not state a cause of action. *Pittsburgh, etc. R. Co.* v. *Fink*, 250 U. S. 257; *Kansas City Southern* v. *Carl*, 227 U. S. 639, 653.

The shipments were delivered more than three years after the cause of action accrued upon which petitioner relies in its amended complaint. By Section 16 of the Interstate Commerce Act this lapse of time not only bars the remedy but destroys the liability. *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662; *Kans. City So. Ry.* v. *Wolf*, 261 U. S. 133; *William Danzer Co.* v. *Gulf R. R.*, 268 U. S. 633.

CONCLUSION.

The judgment entered by the District Court and affirmed by the Circuit Court of Appeals was in accordance with the law and the facts. It is respectfully submitted that no question for review is presented by petitioner and that the petition for review on writ of certiorari should be denied.

W. R. Bleakmore,
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A. B. Enoch,
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APPENDIX I.

Docket No. 17000, Rate Structure Investigation, Part VII—Grain and Grain Products Within Western District and For Export was a proceeding instituted under the provisions of the interstate commerce act, as directed by the Hoch-Smith resolution. In this proceeding the Interstate Commerce Commission undertook to prescribe rates and practices affecting the transportation of grain and grain products throughout the western district, the western district being defined roughly as that territory west of Chicago and of the Mississippi River, including Memphis and other eastbank crossings.

On July 1, 1930, the Interstate Commerce Commission entered its first report and order therein, 164 I. C. C. 619 (Exhibit No. 6, R. 77), and thereafter, on April 13, 1931, a supplemental report on further consideration was handed down (Exhibit No. 8). Rates, rules and regulations in compliance with the above reports and orders were published in tariffs and filed with the Interstate Commerce Commission, effective August 1, 1931. This rate adjustment, so prescribed is referred to by the Interstate Commerce Commission in subsequent reports as the Part 7 adjustment.

The Part 7 adjustment was cancelled, effective February 1, 1932, as a result of the decision of the Supreme Court of the United States in *Atchison, T. & S. F. Ry. Co.* v. *United States*, 284 U. S. 248. Following the cancellation of the Part 7 adjustment, the rate adjustment in effect July 1, 1931, was restored. The Interstate Commerce Commission reopened the proceeding and after numerous hearings throughout the West, entered its report and order on further hearing, 205 I. C. C. 301 (Exhibit No. 10).

The rates, rules and regulations published by defendants and other carriers and filed with the Interstate Commerce

Commission effective July 1, 1935, were in compliance with the last above-mentioned report and order and are the rates, rules and regulations which applied to the transportation of the shipments in the present lawsuit.

The following excerpts from the said reports and orders of the Interstate Commerce Commission, in evidence in this case, are for the purpose of showing that to have permitted plaintiff or any other shipper to take transit on shipments such as the shipments in question at either Enid, or at Kingfisher, or at any other intermediate point on the Rock Island route from St. Louis to Memphis, on any through rate other than the combination of rates on Kansas City, would have been in violation of the said reports and orders of the Interstate Commerce Commission; and that item 20 in the tariff was published in order to provide against such violations:

> Excerpt from the report and order of the Interstate Commerce Commission in No. 17000—Rate Structure Investigation, Part VII—Grain and Grain Products Within Western District And For Export, 164 I. C. C. 619, 644, 645 (Exhibit No. 6 and 7, R. 77).
>
> "AS TO PROPRIETY OF BOTH PROPORTIONAL RATES AND TRANSIT BALANCES.
>
> "The propriety of the present dual system of proportional rates and transit balances from the markets is open to question from the standpoint of orderly tariff procedure. It may be argued that the transit balance as well as the proportional rate is specifically provided for by tariff. But we are charged with the proper regulation of the construction of tariffs, and with the prevention of abuses in tariff administration, as well as with the prevention of undue preferences between outbound shippers. We clearly are empowered to say whether, in all the circumstances affecting the grain traffic, proportional rates shall be employed exclusively, or in part, or at all.

"TRANSIT BALANCE AT PRIMARY MARKETS A DISORGANIZER OF RATES.

"The transit balance at primary markets has always been a source of disorganization of rates. It gave rise to the proportional rate, as a result of carriers from the markets, not parties to the overhead rate, publishing, as already stated, the transit balance as a proportional rate. Certain of the carriers to-day publish what are known as varying proportional rates, restricted to apply only on grain from specified territories from which there are overhead through rates in which they do not participate. There are requests upon this record for the translation of some of the existing transit balances into open proportional rates. Just so long as transit balances remain a substantial factor in the adjustment of rates from the primary markets, just so long will there be undue preferences between outbound shippers, as well as general instability in rates resulting from shippers seeking the translation of transit balances into proportional rates. Prior to General Order No. 28 of the Director General of Railroads, already referred to, rates were generally on the combination basis, and there was a minimum of complaint against this method of rate adjustment. A return as closely as practicable to that basis would go far toward eliminating much of the complaint that has arisen from time to time concerning the relation of rates through the various primary markets. The best interests not only of the primary markets, but of the producer, consumer, and carrier will be served by the fullest application of the rate-break combinations through primary markets.

"APPLICATION OF PROPORTIONAL RATES REQUIRED FROM PRIMARY MARKETS.

"We find that the practice of contemporaneously charging both proportional rates and transit balances subjects the shipper under proportional rates to undue prejudice and disadvantage, and gives to the shipper under the lower transit balance an undue preference and advantage, from which the carriers will be required

to cease and desist; that the through rates herein prescribed, on the basis of flat rates to the primary markets and proportional rates beyond, will be reasonable; and that overhead through rates less than those combinations should be cancelled.

"EXCEPTIONS TO PERMIT CARRIER COMPETITION.

"The foregoing finding is not intended to prevent carrier competition that does not disrupt the basis of making rates by combination on the primary markets. *Thus the combination on a given market may be applied as a through rate through another market on which the combination is higher than on the market first mentioned, provided that the shipment is not stopped in transit at the market or other intermediate point on the route over which the higher combination obtains; but if the shipment is stopped at either the market or other intermediate point on the latter route, the higher combination must be applied. Similarly, a proportional rate from one market to another may be applied over a competitive route through a third market on which the combination is higher than over the direct route, provided the shipment is continuous, but the higher combination of proportional rates to and from the third market will be applied on shipments stopped there or at any other intermediate point for transit purposes on that route.*" (Italics ours.)

Excerpts from the supplemental report and order of the Interstate Commerce Commission on further consideration in No. 17000—Rate Structure Investigation, Part VII—Grain and Grain Products Within Western District And For Export, 173 I. C. C. 511, 515, 516, 517 (Exhibits No. 8 and 9, R. 78).

"APPLICATION OF PROPORTIONAL RATES REQUIRED FROM PRIMARY MARKETS.

"The findings, at page 645[2], do not prohibit the application of joint rates through primary markets, and transit balances beyond the markets, where proportional rates from the markets are not in effect.

2. References are to page numbers of the original report.

"The requirement merely is that a proportional rate, once established, must be charged, and can not be defeated by a lower transit balance between the same points. For example, transit balances are prohibited from Omaha to Chicago, because there is a proportional rate from Omaha to Chicago, but they are not prohibited from Omaha to north Pacific coast territory, where proportional rates are not in effect (see pages 674-675) * * *.

"EXCEPTIONS TO MEET CARRIER COMPETITION.

"The findings, at page 645, cover instances of one rate-break route competing with a lower route, either direct or rate break. For example, the direct rate from a point in southeastern South Dakota to Chicago may be applied through Minneapolis on a continuous shipment, but the higher combination on Minneapolis must be charged on a shipment stopped at Minneapolis or other intermediate point on that route; the combination on Omaha from a point in Nebraska to Chicago may be applied through Kansas City on a continuous shipment, but the higher combination on Kansas City must be charged on a shipment stopped at Kansas City or other intermediate point on that route; the proportional rate from Omaha to Chicago may be applied through Kansas City on a continuous shipment, but the higher combination of proportional rates to and from Kansas City must be charged on a shipment stopped at Kansas City or other intermediate point on that route; or the rate of the Missouri Pacific from Kansas City to Little Rock or Memphis, through Carthage, Mo., may be applied over its route through St. Louis on a continuous shipment, but the higher combination on St. Louis must be charged on a shipment stopped at St. Louis or other intermediate point on that route. *The purpose of the finding is to prevent the defeat of the proportional rate by a transit balance lower than the proportional, but not otherwise to curtail carrier competition. The restriction is laid on the intermediate points other than the market, as well as upon the market, in order not to discriminate against the market in favor of the other intermediate points.*

The reason for the restriction as to all intermediate points would be apparent if the combination rate over the higher route were published as an overhead rate, for then, manifestly, transit would be accorded only at the higher rate applicable over that route." (Italics ours.)

Excerpts from the report and order of the Interstate Commerce Commission on further hearing in No. 17000, Rate Structure Investigation, Part VII—Grain And Grain Products Within Western District And for Export, 205 I.C.C. 301, 327, 342 (Exhibit No. 10). (R. 79.)

"GENERAL PLAN OF THE PART 7 ADJUSTMENT.

"The general plan of the Part 7 adjustment was the prescription of specific local or flat rates from selected origins, or key point, in the various grain-producing areas to the so-called rate-break markets; proportional rates, lower than the flat rates,[9] from those markets to final markets [10] and other destinations, including ports of export; through rates equal to the combinations of the inbound flat rates and outbound proportionals, the so-called 'rate-break combinations'; specific rates from key points to destinations other than the rate-break markets, not affected by the rate-break combinations, including ports of export; directions to the carriers to readjust rates between points not specifically mentioned in the findings in reasonable relation to the rates specifically prescribed; so-called

9. The application of proportional rates is limited to shipments "from beyond," and requires, as proof of prior transportation, the surrender of a freight bill, previously registered with the transit bureau, covering an inbound rail shipment of tonnage equivalent to that shipped outbound.

10. The rate-break markets, include Minneapolis and Duluth, and the Missouri River markets from Sioux City, Iowa, and the Missouri River markets from Sioux City, Iowa, south to Omaha, Nebr., Atchison, Kans., St. Joseph, Mo., and Kansas City, Mo. The final markets include Chicago, Peoria, and Cairo, in Ill., St. Louis, Mo., and Memphis, Tenn., which, however are also rate-break markets for shipments to the eastern and southeastern territories, beyond the territorial scope of this proceeding.

interior mileage scales for maximum application between points between which specific rates were not provided by the other methods mentioned; and export rates from Omaha, Kansas City, St. Louis, and central Illinois to eastern seaboard and Gulf ports, and from Chicago to eastern seaboard ports.

"The prescribed proportional rates, with a few exceptions, were revisions of proportional rates already in existence, the principal of which were those from the Missouri River markets to Minneapolis, Duluth, Chicago, Milwaukee, Peoria, St. Louis, Memphis, and groups in Arkansas, Louisiana, and Texas; from St. Louis and Cairo, Ill., to Memphis, Tenn., and to groups in Arkansas, Louisiana, and Texas; from Duluth and Minneapolis to Chicago, Milwaukee, Peoria and St. Louis; between the Missouri River markets; and between Minneapolis and Duluth.

"RULE FOR EXCLUSIVE APPLICATION OF RATE-BREAK COMBINATIONS PRESCRIBED.

"During the period of the Part 7 adjustment there were but few complaints against the rule for the exclusive application of the rate-break combinations. In most instances the issue was not raised prior to the appearance of the parties at the reopened hearings. In some instances the criticisms there registered were general in character, and seemed to be based more on principle than on damage actually sustained. In other instances the difficulties complained of were shown to be due largely, if not mainly to abnormal conditions in respect of the sources of grain supply and demand. The rule should be given a more comprehensive test than was afforded during the period of the Part 7 adjustment. *The finding in the original report that the rate-break combinations must be the exclusive basis of charge on shipments* through the rate-break markets, when stopped at those markets is affirmed.

"EXCEPTIONS TO MEET CARRIER COMPETITION.

"In the original report (page 645) an exception to the rule for the exclusive application of the rate-break combinations was made in respect of *shipments through a rate-break market to meet the carrier competition of a lower-rated route*, provided the shipments were not *stopped at the rate-break market or other intermediate point on the equalized route, the rate-break combination to apply on shipments stopped in transit on that route. That finding, as more fully explained in the supplemental report* (page 515)[20] *is adhered to.*"

20. "But transit may be permitted at an intermediate point other than the market, and not at the market, on the higher route when the intermediate transit point on the higher route is also a transit point on the direct route. For example, transit may be permitted at Fort Dodge, Iowa, but not at Omaha, on a shipment from Sioux City to Chicago, through Omaha and Fort Dodge, to meet the competition of a direct route from Sioux City through Fort Dodge to Chicago, with transit at Fort Dodge; or at Mankato, but not at Omaha or Sioux City, on the route from Kansas City to Minneapolis, through Omaha, Sioux City, and Mankato, to meet the competition of a direct route from Kansas City, through Des Moines and Mankato, with transit at Mankato; or at Cedar Rapids, but not at Omaha, on the route from Kansas City, through Omaha and Cedar Rapids to Chicago, to meet the competition of a direct route from Kansas City through Cedar Rapids to Chicago, with transit at Cedar Rapids."

APPENDIX II.

Rule III of the Commission's Rules of Practice.

III. Complaints.

(a) (*Complaints either informal or formal.*) Complaints may be either informal or formal.

Cross References

* * * * *

(b) (*Informal complaints.*) Informal complaints may be made by letter or other writing and as received are filed. Matters thus presented are, if their nature warrants it, taken up by correspondence with the carriers affected in an endeavor to bring about satisfaction of the complaint without formal hearing, and are given serial numbers on the informal docket. This informal procedure has been found efficacious in the great majority of cases and is recommended.

Cross References

* * * * *

(c) (*Substance of informal complaint.*) No form of informal complaint is prescribed, but in substance the letter or other writing must contain the essential elements of a complaint, including name and address of the complainant, the name of the carrier or carriers against which complaint is made, a statement that the act has been violated by the carrier or carriers named, indicating when, where, and how, and a request for affirmative relief. It is desirable that the informal complaint be accompanied by copies in sufficient number to enable the Commission to transmit one to each carrier named, and it may be accomplished by supporting papers.

Cross References

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(d) (*Informal complainant may complain formally.*) A proceeding thus instituted on the informal docket is without prejudice to complainant's right to file and prosecute a formal complaint, whereupon the proceeding on the informal docket will be discontinued.

Cross References

• • • • •

(e) (*Statute of limitations, requisites of informal complaints as to damages.*) Section 16 (3) of the act provides that all complaints for the recovery of damages shall be filed with the Commission within the statutory periods there specified, and not after. A complaint for the recovery of damages may be informal, but must be filed within the statutory period, and, if informal, should contain, in addition to the matters above indicated, such data as will serve to identify with reasonable definiteness the shipments or other transportation services in respect to which recovery is sought, the carriers participating, the kind and amount of injury sustained, when and by whom, and, if any recovery is sought on behalf of others than complainant, a statement of the capacity or authority in or by which complaint is made in their behalf. Such a complaint must be subscribed and verified as is required in the case of formal complaints under paragraph (h) 2 of this rule. Notification to the Commission that a complaint may or will be filed later for the recovery of damages is not a filing of complaint within the meaning of the statute.

Cross References

• • • • •

(f) (*Special docket applications.*) Carriers willing to pay damages for violations of the act should make application in the form prescribed by the Commission for authority to pay. Such applications will be filed on the special docket under serial number, and, if granted, orders to that effect will be entered on the special docket. Such application, when not made upon informal complaint filed with the Commission, must be filed within statutory period and will be deemed the equivalent of an informal complaint and an answer thereto admitting the matters stated in the application. If a carrier is unable to file such application within the statutory period and the claim is not already protected from the operation of the statute by informal complaint, a statement setting forth the facts may be filed by the carrier within the statutory period. Such statement will be deemed the equivalent of an informal complaint filed on behalf of the shipper and sufficient to stay the operation of the statute.

Cross References

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APPENDIX III.

"REMEDIES OF PERSONS DAMAGED; ELECTION; WITNESSES.

"SEC. 9. (As amended August 9, 1935.) (U. S. Code, title 49, sec. 9.) That any person or persons claiming to be damaged by any common carrier subject to the provisions of this part may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this part, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

(21)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 694.

BURRUS MILL & ELEVATOR COMPANY OF OKLAHOMA,
Petitioner,

v.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, FRANK O. LOWDEN, JAMES E. GORMAN, and JOSEPH B. FLEMING, as Trustees of the Chicago, Rock Island & Pacific Railway Company, *Respondents.*

REPLY BRIEF OF PETITIONER.

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SUBJECT INDEX.

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REPLY BRIEF OF PETITIONER.

I.

THE STATEMENT OF THE CASE IN RESPONDENTS' BRIEF MERELY ADDS EXTRANEOUS MATTER; AND IN NO WAY AIDS IN A BETTER UNDERSTANDING OF THE CASE.

The petitioner in accordance with the rules of this Court and following what is universally acknowledged to be good practice confined its statement in the petition to a concise

narration of the facts necessary for the Court to know in order to pass upon the questions raised in the petition and brief. The respondents have followed the same course which they followed in both of the Courts below, and that is to burden the Court with tedious recitation of unimportant and irrelevant matter. As a glaring instance of the introduction of extraneous matter into the discussion of the questions involved, we point to the constant harping of the respondents of the celebrated grain case (Docket No. 17000, Part 8) which has nothing to do with this case. The question involved is the proper interpretation of certain items in freight tariffs published by the respondents. It makes no difference whether those tariffs were published by reason of an order of the Interstate Commerce Commission or whether they were published in the regular course of business of the respondents. Once they were published the rates set forth therein became legal rates which must be charged by the respondents and paid by the petitioner and all other shippers. The question, therefore, is what rates under the terms used in the tariffs are applicable to the shipments in question.

Under the heading of "The Facts Relating to the Transportation of the Shipments" there is an entirely unnecessary discussion of the details surrounding the shipments, which the Court may well ignore, as it has no bearing upon the ultimate facts with which the Court must deal.

II.

THE CASE WAS NEVER DECIDED BY THE INTERSTATE COMMERCE COMMISSION.

Under the heading "Method of Procedure Adopted by Petitioner for Recovery of Damages" (Respondents' brief pages 13 to 15 and again beginning on page 42 and extending to page 49) respondents attempt to show, as they did unsuccessfully below, that by reason of certain correspondence had with the Interstate Commerce Commission the pe-

titioner had followed one of two procedures open to it, and was, therefore, not entitled to maintain the action in Court. The respondents follow two methods in attempting to accomplish their purpose. They refer to an informal complaint, when none was ever filed, and they refer to a special docket proceeding which would involve only the reasonableness of the rates; and there is no question in this case of reasonableness.

No informal complaint was ever filed.

The letters which are said by respondents to constitute one of the informal complaints are one written to the Secretary of the Commission by Mr. D. R. Simpson, General Traffic Manager of the Tex-O-Kan Flour Mills Company of Dallas, Texas, dated August 29, 1935 (R. 180-181), and another one to the Secretary from Mr. Simpson, dated August 26, 1935 (R. 183-186). In determining whether or not these letters constituted an informal complaint as contemplated by the Commission's Rules of Practice, it is necessary to refer to such rules, particularly 5(b) and 5(c) on page 11 and 5(d) and 5(e) on page 12 thereof.[1]

It will be readily understood that in administering the Interstate Commerce Act, the Commission receives numerous letters, complaining of various acts committed or unperformed by the various types of carriers subject to its jurisdiction. There may be complaints of inequitable distribution of cars, failure of buses to stop, unsanitary conditions in wash rooms or on trains, poor switching service, or anyone of a hundred things. All of such informal complaints receive attention and, no doubt, the majority are satisfactorily adjusted. But an informal complaint for the recovery of damages is quite another matter.

These letters said to be an informal complaint for the recovery of damages fall far short of that status. In the first place, the name of the petitioner Burrus Mill & Elevator Company of Oklahoma appears nowhere therein. Neither does the name of the respondents, Frank O. Low-

[1] Reproduced in appendix of respondents' brief. (p. 61-62)

den, James E. Gorman and Joseph E. Fleming as trustees of the Chicago, Rock Island & Pacific Railway Company, appear therein. Rule 5(e) provides that a complaint for the recovery of damages may be formal or informal and, if informal, should contain, in addition to the name and address of the complainant, the name of the carrier, a statement that the Act had been violated by the carrier, indicating when, where, and how, and a request for affirmative relief,

> "such data as will serve to identify with reasonable definiteness that shipments or other transportation services in respect of which recovery is sought, the carriers participating, the kind and amount of injury sustained, when and by whom, and, if any recovery is sought on behalf of others than complainant, a statement of the capacity or authority in or by which complaint is made in their behalf. Such a complaint must be subscribed and verified as is required in the case of formal complaints."

A footnote at the bottom of page 12 of the Rules of Practice states:

> "Illustrative of pertinent data, are in case of shipments, their dates, origins, destinations, consignors, and consignees, dates of delivery, or tender of delivery, car numbers and initials, if in carloads, routes of movement, if known, commodities transported, weight, charges assessed, at what rate, when and by whom paid, and by whom borne."

None of the essential elements of the complaint are to be found in these letters. Neither the complainant nor the defendants is named, the origins of the grain are not mentioned, the destinations of the flour are not stated. They are not verified, contain no allegation that the Act, as a whole or any section thereof, has been violated by the defendants, no damages are prayed for, and there is nothing to indicate whether there are involved 2 or 200 cars. The most that can be said for this correspondence, including the

letter from Mr. J. G. Gutsch, Assistant Freight Traffic Manager of the respondents, dated August 26, 1935 (R. p. 182) is that it seeks an informal interpretation by the Commission's Section of Traffic of tariff items by the Tex-O-Kan Flour Mills Company and an officer of respondents, and that the respondents' letter last mentioned indicates that, in their opinion, the tariffs are ambiguous. These letters from the General Traffic Manager of the Tex-O-Kan Flour Mills Company must be construed as if they had been written by the traffic manager of a Board of Trade, Millers Association, or other person not a party to the transportation records, which letters would have been given similar handling.

A.

The Special Docket Applications Deal with Another Subject.

There were two other presentations to the Commission which respondents claim constituted an election by the petitioner and they are the so-called special docket applications, the first of which is 179345 (R. pp. 227 to 245), and the second 183006 (R. pp. 191 to 224). A sharp distinction must be made between an informal complaint and the special docket applications.

An informal complaint must be filed by the complainant and be verified by him under the Commission's Rules of Practice.

B.

Special Docket Applications Must Be Filed by the Carrier.

Rule 5(f), p. 13 of the Rules of Practice states that,

> "Carriers willing to pay damages for violations of the Act should make application in the form prescribed by the Commission for authority to pay."

We call the Court's attention to the difference between reparations for charging unreasonable rates and claims for the exaction of charges in excess of the filed rates. In the

former, attack is made upon the rates which are filed as being unreasonable, and this ordinarily calls for the exercise of the Commission's special and technical knowledge. In the latter, no attack is made upon the reasonableness of the rate in the tariff on file but it is simply asserted that the carrier charged more than the rate on file.

An examination of these special docket applications shows that the Chicago, Rock Island & Pacific Railway Company, in the first-mentioned application, sought authority to pay the Burrus Mill & Elevator Company $733.92 as *reparation for the exaction of unreasonable transit* charges on certain of the shipments involved here. In the second special docket application the same Railway Company sought authority to pay to the Burrus Mill & Elevator Company $23,669.07 as *reparation for the exaction of unreasonable transit charges* on the remainder of the shipments involved here. It will be seen, therefore, that the special docket applications filed by the Railway Company deal with reparation for the exaction of unreasonable transit charges, whereas this is purely a suit to recover overcharges—charges in excess of the filed rate and involves merely a matter of tariff construction and does not in any sense involve the question of the reasonableness of any rate, rule, or regulation.

It is recited in the special docket applications (R. p. 196 and R. p. 232) that the net result of the assessment of 34 cents instead of 11 cents for the rate factor from St. Louis to Memphis was equivalent to assessing a charge of 23 cents per hundred pounds for stopping shipments in transit at Kingfisher. The same applications (R. p. 196 and R. p. 223) state that it is admitted that the rates or rules legally applicable at the time and over the routes the shipments moved were, under the circumstances and conditions then existing, excessive and unreasonable. That question is not here before the Court.

The sole contention here is that the 11 cents rate factor was either applicable to the shipments in question, with

transit privileges at Enid and Kingfisher, or that the tariffs were ambiguous and should be construed against the maker thereof. It is conceded that the filing of these special docket applications would, under the Commission's rules, toll the statute of limitations as to the particular matters that are covered by them, i.e., violations of Section 1 of the Act, which requires that the carriers maintain reasonable rates, rules and regulations. However, they would not toll the statute of limitations as to violations of Section 6 of the Act, which requires the carriers to file tariffs which shall plainly state the rates, rules and regulations and strictly observe the terms of said tariffs.

It is clear from the foregoing that the letters from Mr. Simpson to the Secretary of the Commission did not measure up to a complaint for the recovery of damages, which would constitute an election, and the special docket applications filed by the Railway Company dealt with an entirely separate subject, namely, the reasonableness of the transit charge imposed of 23 cents per hundred pounds. These special docket applications filed by the Railway Company cannot constitute an election by the appellant as they were not filed by the appellant and because they deal with a different subject-matter. The letter from the Acting Secretary of the Commission to Mr. Simpson, dated September 4, 1935 (R. pp. 187-8), shows that many of the facts appearing of record here were not before the Commission's Section of Tariffs at the time the matter was being considered there. It is significant that this letter states (R. p. 188):

> "This opinion, of course, is informal only and is without prejudice to your right to file a formal complaint if you desire to attack the conclusions thereof."

There is nothing in the letter to indicate that the matter was considered by the Commission or a Division thereof, and it does not indicate that it is or purports to be a Report and Order of the Commission. It appears to be a letter prepared by the Section of Tariffs for the signature of the

Acting Secretary. Complaints before the Commission are decided by the Commission or a Division thereof and are disposed of by formal orders and written reports. At best, this letter can be construed as an opinion of one of the employees of the Commission based upon a very meager showing of facts. In no sense can it be construed as an official act of the Commission.

III.

THE EXCEPTION TO ITEM 20.

On page 15 of petitioners brief in support of the petition, it is shown that when certain of these shipments of wheat were moved out of Enid to Kingfisher for milling that there was no additional transportation charge accrued or assessed and the contention was made that if Item 20 meant that a shipment from St. Louis to Memphis, milled at Kingfisher or stored at Enid, made it necessary to have collected the Kansas City combination of 34 cents, then the same item certainly meant that on a shipment of wheat from St. Louis to Kingfisher, stored at Enid, the combination on Kansas City would also have to be applied. On page 27 of the brief of respondents an attempt is made to refute petitioner's contention in this matter but it is very significant that there is no reference whatever to any tariff item or any portion of the record. The record is made up of a stipulation of facts and various documents including the tariffs and nowhere is there any substantiation of any of the alleged facts appearing on page 27 of respondents' brief. That being true, all that appears thereon must be ignored.

CONCLUSION.

In opening the argument in their brief the respondents on page 19 quote from *Southern Pacific Co.* v. *Lothrop,* 15 Fed. (2d) 486 the following quotation found on page 487:

> "Astute ingenuity might succeed in reading ambiguity into the language, but the ordinary, intelligent shipper would find none."

This quotation is set forth in bold face type by respondents, and it is a happy quotation indeed from the point of view of the petitioner because it shows that it is language completely inapplicable to the situation here. Not only did the shipper find the provisions ambiguous, but so did the respondents although it was their tariff which contained the ambiguity. In writing to the Secretary of the Interstate Commerce Commission respondents stated (R. p. 82):

> "* * * insofar as concerns Item 20 Rock Island Tariff 34562 we have not in our attempt to interpret the various tariff provisions felt that we could safely construe such Item 20 as being set aside by the other items in the tariff mentioned, namely 600 and 735-A".

This Court has said on innumerable occasions that where there is no ambiguity there is no necessity for construction, and we submit that this is correct, and plainly shows that the necessity for construction did arise here because of the very fact that the tariff was ambiguous.

The case was decided erroneously by the Circuit Court of Appeals; the petition should be granted and the judgments below reversed.

Respectfully submitted,

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